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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
Appellant,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED *

1. Whether a "mountain view" ordinance, adopted by the Denver City Council at the behest of a group of local homeowners opposed to the proposed development plans of out-of-state landowners, and which destroys at least 60% of the value of the landowners' holdings under otherwise controlling city zoning regulations, escapes scrutiny under the "takings" clause of the Fifth and Fourteenth Amendments solely because it does not deprive the landowners of all value attached to their property.

2. Whether the Fifth and Fourteenth Amendments require a state court to enter a money judgment against a governmental entity when a regulatory measure adopted by that entity results in a "taking" of private property.

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* The following are subsidiaries of Harsh Investment Corporation: Claremont Hotel Corporation; Fountain Gallery of Art, Inc.; The Fountain Fine Arts, Inc.; Harsh Building Co.; King Tower, Inc.; MacArthur/Broadway, Inc.; Public Service Agency Co.; Regency Tower Corp.; Harsh Colorado Corp.

Harsh Investment Corporation is a general partner in Harsh Realty Co. and Clay Tower Apartments.

In addition to the parties set forth in the caption, the following are parties to this action:

1. *Plaintiffs*: Landmark Land Company, Inc.; Southmoor Park Shopping, Inc.

2. *Defendants:* The City Council of the City and County of Denver and its members, Cathy Reynolds, Robert Crider, William A. Scheitler, T.J. Hackworth, M.L. Sandos, Paul A. Hentzell, Paul L. Swalm, John J. Silchia, Edward F. Burke, Jr., King M. Trimble, Salvadore Carpio, Cathy Donohue, William R. Roberts; William H. McNichols, Mayor of the City and County of Denver; the Building Department of the City and County of Denver; Jack Tanigawa, Acting Director of the City and County of Denver.

3. *Defendants-Intervenors*: Southmoor Park East Homeowners Association, Inc.; Thomas P. McCallin.

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On Appeal from the Supreme Court, State of Colorado

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the Colorado Supreme Court (App. A at 1a-14a), dated December 2, 1986, is reported at 728 P.2d 1281. The transcript of the state district court's decision, rendered August 15, 1984, is reproduced in App. B (at 15a-25a). The district court's order dismissing appellant's complaint (App. C at 26a) was entered August 28, 1984.

JURISDICTION

The decision of the Colorado Supreme Court was rendered December 2, 1986. Appellant's motion for rehearing was denied by an order of the Colorado Supreme Court entered December 22, 1986 (App. D at 27a-29a). The notice of appeal (App. E at 30a-33a) was filed with the clerk of the Colorado Supreme Court on March 2,

1987.[1] The Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

CONSTITUTION AND STATUTES

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

The Fifth Amendment provides, in pertinent part:

> "[N]or shall private property be taken for public use, without just compensation."

Section 10-62.5 of the Revised Municipal Code of the City and County of Denver (hereafter cited as "Code") is reproduced in App. F (at 42a-44a).

STATEMENT OF THE CASE

If a state land-use regulation goes "too far," it constitutes a "taking" within the meaning of the Fifth and Fourteenth Amendments. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).[2] "[T]he difficult problem [is] how to define 'too far,' that is how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Regional Planning Comm. v. Hamil-*

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[1] Pursuant to Rule 10.3 of the Rules of this Court, a copy of the notice of appeal was filed with the clerk of the District Court for the City and County of Denver on that same date.

[2] The Fifth Amendment's taking clause "applies against the States through the Fourteenth Amendment." *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2563 n.1 (1986). *See also Williamson County Regional Planning Comm. v. Hamilton Bank*, 105 S.Ct. 3108, 3111 n.1 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 623 n.1 (1981); *Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226, 236, 239, 241 (1897).

ton Bank, 105 S.Ct. 3108, 3124 (1985). Here, the state trial and appellate courts have given an exceedingly expansive answer to this "difficult problem." Eschewing any careful consideration of the "ad hoc, factual inquiries" identified by this Court (*Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)), the Colorado courts concluded that no state land-use regulation goes "too far" unless it deprives a landowner of all possible value. App. A at 13a-14a; App. B at 19a-20a. This reading of the constitutional limits on state regulatory authority is erroneous, and merits review by this Court. Moreover, because the lower courts' determination of the "taking" issue must be reversed, this case presents the Court with a long-sought opportunity to clarify whether the Fifth and Fourteenth Amendments require a state court to award just compensation when government regulation exceeds constitutional limits.

1. Factual Background

Appellant Harsh Investment Corporation, an Oregon corporation, owns a parcel of land in southeast Denver within a commercial district bounded by Interstate 25 on the west, Hampden Avenue on the north and Monaco Boulevard on the east. Tr. 337.[3] Landmark Land Company, Inc. ("Landmark") and Southmoor Park Shopping, Inc. ("Shopping") own adjoining parcels within the same district.[4] The parcels have for years been zoned for business and residential uses, including high-rise office buildings and condominiums. Tr. 156-157. Although each of the properties is currently developed in whole or in part with commercial uses, none yet takes full advantage

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[3] "Tr." refers to the transcript of proceedings before the state district court.

[4] Landmark is a New York corporation. Shopping is a Colorado corporation.

of the allowable zoning.[5] One half of the Landmark property is not yet developed at all. Tr. 33.

In late 1980, Landmark announced plans to construct a high-rise office building on its property. Tr. 338. Although the plans were consistent with the uses permitted by existing zoning regulations, the proposal angered certain homeowners residing near Landmark's property. Accordingly, the Southmoor Park East Homeowners Association ("SPEHA") organized in opposition to the development. SPEHA's essential complaint was that, despite Landmark's compliance with existing land-use regulations, the proposed construction would be incompatible with nearby residential areas. Tr. 3; Exh. H.[6]

SPEHA's attack on the development was double-barrelled. Initially, SPEHA submitted two applications to downzone commercial properties near its members' homes. Exh. S. At the same time, SPEHA submitted a proposed revision of Article IV of the Denver Municipal Code—the city's "mountain view" ordinance—to the Denver Planning Office.

A rezoning or downzoning application can be approved only after an adequate hearing and review (Code § 59-647(7)) in which it is found that the rezoning is supported by "changed or changing conditions" or "manifest error" in the original zoning. *Id.* at § 59-646. Any such proposal, moreover, must be shown to advance the health, safety or general welfare of the city. *Id.* The burden is on the proponent of the zoning change to prove that such change is necessary. *Id.* at § 59-648.

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[5] Appellant's property is occupied by a Howard Johnson's motel, restaurant and gas station. Shopping's property has a shopping center on the south side of Hampden Avenue, while Landmark's parcel is improved with a movie theater. Tr. 45, 161, 177-178.

[6] "Exh." refers to the exhibits presented before the state district court. The exhibits were admitted by stipulation of the parties. Tr. 4.

The cumulative impact of the above provisions on parties seeking to alter existing zoning is onerous. Indeed, SPEHA's first rezoning application was rejected by the Denver zoning administrator for failure to comply with the applicable ordinances. But it was ultimately unnecessary for SPEHA to shoulder the weight of a rezoning attempt. SPEHA's rezoning applications were withdrawn when the group's alternate line of attack bore fruit.

Article IV of the Municipal Code, entitled "Restrictions on Structures Within Areas Necessary to Preserve Mountain Views," is designed to protect uniquely scenic and panoramic mountain views by restricting building heights. Code § 10-56, App. F at 34a-35a. *See also* Tr. 88; Exh. CC. From the time Article IV was adopted in the mid-1960's until 1982, only five views—all from areas with significant regional and scenic importance—had been protected.[7] These views, moreover, had been protected upon the recommendation of the Denver Planning Office, following a careful analysis of the characteristics of the viewpoint, the quality of the view to be protected, the impact of view restrictions on surrounding properties, and the possibility of existing buildings or foliage obstructing the view. Tr. 244-246; 120-122.

The land on which Southmoor Park is located was developed as a park because drainage problems, steep grades and the existence of a culvert precluded other development. Tr. 159. Except for its designation by the Denver Parks Department as a sledding area, the park lacks any regional significance. Exh. JJ. While some limited views of the distant Rocky Mountains are available

[7] These included Cranmer (Sundial) Park (protected in 1968), Cheesman Park/Botanic Gardens (protected in 1968), Ruby Hill Park (protected in 1969), the State Capitol Building (protected in 1971), and City Park (protected in 1975). In 1983, mountain view ordinances were adopted for State Home Park (App. F at 38a-39a) and Washington Park (App. F at 40a-41a).

from certain points on the edge of the park,[8] those views will be almost totally obliterated in the near future by the growth of trees and other foliage.[9] Indeed, the park's only notable feature is its location: near the homes of SPEHA members. That location was pressed to full advantage when SPEHA proposed an amendment to Article IV of the municipal code establishing a view plane from the edge of the park.[10]

The ordinance drafted by SPEHA differed substantially from any previous mountain view regulation. Unlike any that came before it (or since), the proposal included two exceptions to the view plane it created. First, the SPEHA ordinance included a 42-foot exception for business structures, regardless of whether such structures would intrude into the view plane at that height. Tr. 79; App. F at 43a. Second, the ordinance permitted the owners of existing nonconforming structures, in the event of destruction, to reconstruct their buildings back to present heights, regardless of any impact on the mountain view. Exh. GG; App. F at 44a. The SPEHA proposal was submitted by the homeowners' local city councilman, Paul Hentzell, to the Denver Planning Office.

The Planning Office found that Southmoor Park failed to meet the established criteria it had applied to all previously protected areas, and recommended that the

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[8] Because of the steep topography of the park, mountain views are only possible from the park's outer perimeter. The trial judge noted that "the park line drops over very sharply into a hole," and that "as you go downward, why, you lose the view because it drops off so much." App. B at 23a.

[9] Evidence presented before the trial court showed that existing trees in the park would block the mountain view once they reached 30 feet in height. Tr. 86-94.

[10] Article IV creates view planes by designating fixed reference points and then specifying graduated height limitations which increase the further one moves from the reference points. *See, e.g.*, Code § 10-58(b); App. F at 35a-36a.

SPEHA ordinance be rejected. Tr. 122, 339; Exh. DD.[11] Based on the recommendation of the Planning Office and the evidence presented to it, the Denver Planning Board voted unanimously (with one member abstaining) to recommend to the Denver City Council that the SPEHA proposal be rejected. Exh. EE.

Despite the recommendations of the Planning Board and Planning Office, the City Council on July 19, 1982 yielded to political realities and voted in favor of the interests of several hundred local residents over those of a handful of out-of-state landowners. Tr. 339. As the trial judge noted from the bench, this was "one of those cases where these people [the landowners] don't have very many votes and the Southmoor Park East Homeowners Association has several hundred." App. B at 24a.

Immediately upon enactment of the ordinance, appellant lost all rights previously allowed by zoning to develop its property above 42 feet. Within a few days after the enactment of the ordinance, SPEHA withdrew its pending rezoning applications. Exh. U, V. SPEHA

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[11] Among other reasons, the Planning Office found that the mountain view from the park was minimal (Planning Office criteria require that Mt. Evans be visible at a proposed viewpoint from an 8500 foot elevation upward; at Southmoor Park the mountain is only visible from 9750 feet upward (Tr. 86-94; Exh. DD)), the topography of the park was inappropriate (Planning Office criteria require that a protected park be at least 25 acres in size; Southmoor Park contains only 18.5 acres (*id.*)), the "view" was or shortly would be totally obscured by foliage and permissible development (existing foliage in the park will violate the view plane when it reaches 30 feet in height (Exh. DD)), there would be substantial injury to the burdened commercial property (Planning Office criteria require that not more than 70 acres of business property be adversely affected by a new mountain view ordinance; the Southmoor Park ordinance substantially reduces the value of 390 acres of commercial property (Tr. 86-94; Exh. DD)), and the park had no regional or city-wide significance but was instead simply a neighborhood pocket park (Tr. 145, 137-139).

explained that a change in circumstances made it no longer necessary to pursue the rezoning. Exh. V.

2. Proceedings Below

Within 30 days of the adoption of the SPEHA ordinance, appellant, Landmark and Shopping challenged the validity of the city's action (Tr. 29), and SPEHA intervened as a defendant. Appellant alleged that the SPEHA ordinance constituted a *de facto* downzoning of its property, and that it was accordingly entitled to the procedural protections accompanying a downzoning. Tr. 16-17. Appellant also claimed that enactment of the ordinance despite its failure to meet the Planning Office's articulated criteria was arbitrary and capricious and in excess of the state's police power. *Id.* Finally, appellant asserted that the SPEHA ordinance was confiscatory of its property, in contravention of the Takings Clause of the Fifth and Fourteenth Amendments. *Id.*

The evidence on the first two issues was virtually undisputed. Appellant demonstrated that the SPEHA ordinance was primarily designed not to protect a mountain view, but to deal with issues (such as traffic and population density) traditionally controlled through zoning regulations. The evidence also established that Southmoor Park itself lacked all of the characteristics theretofore required of protected view planes. *See* note 11, *supra.* The trial court nevertheless held that "the City has a right to pass a separate mountain view ordinance without following the charter and ordinance requirements on zoning." App. B at 20a. It also concluded that mountain view ordinances, in general, are rationally related to a legitimate government purpose (*id.* at 21a) and that the SPEHA ordinance was not irrational because some mountain peaks could indeed be seen from certain locations on the edge of Southmoor Park, *id.* at 23a.

On the takings issue, appellant presented extensive evidence showing the actual economic impact of the

SPEHA ordinance on its property and the ordinance's interference with its investment-backed expectations. Prior to the enactment of the ordinance, appellant could have built two 25-story commercial towers on its property. Following the ordinance, development is limited to several two- or three-story structures. Tr. 177-178.[12] Expert calculations demonstrated that, without the SPEHA ordinance, the investment expectation from the appellant's property is $54,600,000. Tr. 180; Exh. UU. With the restrictions imposed by the ordinance, the investment expectation is reduced to $19,220,000. Tr. 182; Exh. UU. The difference, $35,380,000, constitutes an approximate 65% loss in the investment expectation value of the property. *Id.*[13]

Appellant's evidence also illuminated the character of the governmental action embodied by the SPEHA ordinance. The effect of the ordinance was to condemn a scenic easement on appellant's property, without conferring any significant reciprocal benefits on the property owner. As to that easement, moreover, the portion taken was 100%.

Although the trial court noted that the facts regarding the impact of the SPEHA ordinance were "undisputed" and that the economic effect of the measure was "substantial," it rejected appellant's assertion that the ordi-

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[12] Under present zoning regulations, appellant could have built in excess of 1,000,000 square feet of floor area on its property. After the SPEHA ordinance, it can build approximately 300,000 square feet, representing a reduction in floor area in excess of 66%. Tr. 177-178. The appellant's property is zoned for construction of two high-rise towers. After the SPEHA ordinance, the property is suitable only for a complex consisting of three three-story buildings. Exh. KK.

[13] An alternative calculation relating to the fair market value of the property in its current state of development showed that, without the SPEHA ordinance, the property is worth $15 million. With the ordinance, it is worth approximately $6 million. This $9 million loss represents a 60% diminution in value. Tr. 185.

nance violated the Fifth and Fourteenth Amendments because "there was not a complete taking of the . . . properties." App. B at 19a. In the trial court's view, so long as government land-use regulations leave property owners with a shred of value, they are immune from careful constitutional scrutiny. *Id.* at 19a-20a.

Appellant filed a timely appeal to the Colorado Supreme Court, which affirmed as to all three issues pressed in the trial court. On the federal constitutional issue, the court rejected the appellant's taking claim based on the "well-settled rule in Colorado" that an ordinance restricting the use of land is not unconstitutional unless it " 'precludes the use of [the] property for *any* reasonable purpose.' " App. A at 13a (*quoting Ford Leasing Development Co. v. Board of County Commissioners*, 528 P.2d 237, 241 (Colo. 1974)) (emphasis in original).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision of the Colorado Supreme Court raises important and recurring issues regarding the scope of a state's authority to take valuable "strands" from a landowner's "bundle of rights" (*Keystone Bituminous Coal Association v. DeBenedicts*, No. 85-1092, slip op. at 7 (March 9, 1987)) without payment of compensation. Although the SPEHA mountain view ordinance substantially diminishes appellant's property value and dramatically interferes with its investment-backed expectations, the court below held the ordinance constitutional solely because it did not destroy every reasonable use of appellant's property. This single-factor analysis may be appropriate in the context of a facial Fifth Amendment challenge to government regulation,[14] but such an adum-

[14] " 'The test to be applied in considering [a] facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land . . . ." ' " *Keystone Bituminous Coal*, slip op. at 23 (*quoting Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 296 (1981)).

brated approach is patently erroneous where, as here, a litigant has challenged the constitutionality of land-use regulations as applied to discrete property. Indeed, the Colorado Supreme Court's decision disregards *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), in which this Court held that diminution in value and interference with investment-back expectations are significant factors in any as-applied takings analysis. *Penn Central* did not hold that the Constitution affords no relief unless the landowner is left with absolutely nothing of value, and the Colorado Supreme Court's holding to this effect clearly presents a substantial federal question.

The decision below also significantly expands the authority of government to pluck "strands" from a property owner's "bundle" at will (and without compensation) in pursuit of aesthetic values. This is a substantial issue which was surveyed, but not definitively mapped, by *Penn Central*. Plenary review of the lower court's decision is accordingly warranted.

I. THE SPEHA MOUNTAIN VIEW ORDINANCE TAKES APPELLANT'S PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. The Colorado Supreme Court Erroneously Analyzed The "Takings" Issue Under A Single Factor, Total Loss Of Value Test

This Court has frequently emphasized that the term "property" as used in the Takings Clause includes the entire "group of rights" inhering in the citizen's ownership. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). The term is not used in the

> vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. . . . [Instead, it] denote[s] the group of rights inhering in the citizen's relation to

> the physical thing, as the right to possess, use and dispose of it . . . . The constitutional provision is addressed to every sort of interest the citizen may possess.

Id. at 377-378.

Beyond dispute, the SPEHA mountain view ordinance appropriates a valuable property right of the appellant. *See Griggs v. County of Allegheny*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946). By totally prohibiting any construction above 42 feet, the City of Denver has acquired the "equivalent of a fee interest" in appellant's airspace—an action which absolutely destroys "[t]he owner's right to possess and exploit [that interest in] the land." *Causby*, 328 U.S. at 262. *Cf. Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922). The SPEHA ordinance, in effect, burdens appellant's property with a scenic easement, with the benefits of that easement flowing primarily to SPEHA members. The property interest acquired by the city, moreover, has demonstrable value. *See* Cantrell, *Scenic Easements: Evaluation Considerations*, 49 Real Estate Appraiser and Analyst 61 (1983); Sutte, *Scenic Easements*, 34 Appraisal Journal 531 (1966). And, as to that easement, the taking is complete.

This Court has recognized that there is no established formula for determining whether the regulatory acquisition of such a property interest constitutes a taking for which just compensation is required; rather, analysis must center on the circumstances of each case. *See United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). *See also FCC v. Florida Power*, No. 85-1660, slip op. at 4-6 (February 25, 1987); *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566 (1986); *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Kaiser Aetna*, 444 U.S. at 175. The general guidelines for that analysis, however, are settled. Courts must pay particular attention to the economic impact of a regulation on com-

plaining property owners, the regulation's interference with distinct, investment-backed expectations, and the character or nature of the government action. *Penn Central*, 438 U.S. at 124; *Keystone Bituminous Coal*, slip op. at 16, 18. Only through a close evaluation of these and other pertinent factors can one determine when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U.S. at 124.

The Colorado Supreme Court's analysis eliminates all of the above factors from the takings determination. That court recognized—and then dismissed as inconsequential—the fact that the SPEHA ordinance "substantially diminished the value of appellant['s] property." App. A at 8a; App. B at 19a. Moreover, the court refused to even consider appellant's argument that the ordinance substantially interfered with its distinct investment-backed expectations.[15] Instead, the court substituted a single, oversimplistic query: whether the property owner had anything left after the state took what it wanted.[16] That test was not met because Denver had not "take[n] all value" from appellant's property. App. A at 8a.

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[15] While appellant specifically argued and presented evidence on this factor (*see Brief for Appellant Harsh Investment Corp., Landmark Land Co. v. City and County of Denver*, No. 84SA410 (Colo. S.Ct.)), the state supreme court did not even consider it, holding instead that its "no value" analysis was dispositive. App. A at 13a-14a.

[16] The court's opinion makes clear that, in Colorado, no other factor is even relevant to the takings analysis: "It is a well-settled rule in Colorado that in order to establish that an ordinance . . . is unconstitutional, it must be shown that the 'ordinance precludes the use of [the] property for *any* reasonable purpose.' " App. A at 13a (*quoting Ford Leasing Development Co. v. Board of County Commissioners*, 528 P.2d 237, 241 (Colo. 1974) (emphasis in original).

The Colorado court's "takings" test is quickly applied, but its impact is unduly (and unconstitutionally) draconian. In effect, if any value remains in property following a regulatory action, the regulation itself is not a taking—regardless of diminution in value, effect on investment-backed expectations, or the nature of the governmental interests involved. This narrow inquiry is flatly inconsistent with this Court's prior cases, and is forbidden by the Takings Clause.[17] Property "values are enjoyed under an implied limitation and must yield to the police power," but that "implied limitation must have its limits, or the contract and due process clauses are gone." *Pennsylvania Coal*, 260 U.S. at 413. The Colorado Supreme Court's "no value" analysis stretches state police power beyond all reasonable latitude,[18] and distorts fundamental principles of Anglo-American property law. The test, for that reason, is inadequate to protect the constitutional guaranty that property not be taken without compensation.[19]

This is not to say that the Constitution protects against any diminution in value. But *Penn Central* teaches, we submit, that a rigid, *per se* approach is inappropriate at either end of the spectrum. In any event,

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[17] The "no value" test becomes even more onerous when coupled with the "beyond a reasonable doubt" standard of proof Colorado applies to constitutional claims. Under this standard, to prove an unconstitutional taking, a litigant must not only show that government action takes all property value—that showing must be made beyond all reasonable doubt. App. A at 9a.

[18] *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Kaiser Aetna v. United States, supra.*

[19] Certainly the Fifth and Fourteenth Amendments would protect against Denver's taking a 100-foot right-of-way easement across a parcel of property 1000 feet wide, even though 90% of the property was unaffected. It is difficult to distinguish that hypothetical from what happened here. In both cases, an easement was taken.

there can be little doubt about the substantiality of the question.[20]

B. The Impact Of The Ordinance, Appellant's Lost Expectations And The Nature Of The Governmental Action Establish The Regulation As A Taking

Reasoned application of the factors first noted by this Court in *Penn Central* demonstrates that the SPEHA ordinance constitutes a taking of appellant's property. The diminution in the value of appellant's property severely impacted appellant's investment-backed expectations. Those expectations were grounded in longstanding zoning regulations that, instead of being amended by a process in which appellant could meaningfully participate, were short-circuited by a political juggernaut which effectively left appellant without representation. Moreover, the nature of the governmental action, involving

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[20] Colorado is not the only state judicial system to ignore the limitation on police power embodied in the Takings Clause. Six other states also apparently apply a rigid "no value" test. *See, e.g., Commonwealth v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378 (Ky. 1984), *appeal dismissed*, 105 S. Ct. 3549 (1985) (to constitute a taking, state action must deprive owner of all beneficial enjoyment of property); *State v. Good Samaritan Hospital*, 299 Md. 310, 473 A.2d 892 (1983), *appeal dismissed*, 469 U.S. 802 (1984) (there is a taking only if state restriction essentially deprives the owner of all beneficial uses of his property); *Ramer v. City of Hoover*, 437 So.2d 455 (Ala. 1983) (there is no taking unless the interference is so substantial as to render the property worthless or useless); *Spears v. Berle*, 48 N.Y.2d 254, 397 N.E.2d 1304, 422 N.Y.S.2d 636 (1979) (in order to be classified as a taking, state action must render property unsuitable for any reasonable income, totally destroying its economic value); *Metzger v. Town of Brentwood*, 117 N.H. 497, 374 A.2d 954 (1977) (taking is a restriction which deprives owner of any reasonable use of his land); *Zygmont v. Planning and Zoning Commission*, 152 Conn. 550, 210 A.2d 172 (1965) (to constitute a taking, zoning regulations must do more than devalue property—they must also deprive owner of any reasonable property use). Accordingly, review is appropriate here not only to correct the error of the Colorado courts, but also to provide needed guidance for other states.

the promotion of aesthetics rather than abatement of a public nuisance, suggests that the Court need not be "hesitan[t] to find a taking." *Keystone Bituminous Coal*, slip op. at 18. Review by this Court is essential to clarify that the *Penn Central* factors do not release land-use regulations from the strictures of the Fifth and Fourteenth Amendments. *Cf. Pennsylvania Coal*, 260 U.S. at 413.

1. The diminution in value of appellant's property here is considerably more severe than the loss involved in *Penn Central*. In that case, the Court held that the designation of a railroad terminal as a "historical landmark" did not constitute a taking even though regulations accompanying the designation prohibited any future construction which did not "harmonize in scale, material, and character" with the landmark. 438 U.S. at 137. Critical to the Court's analysis, however, was the fact that the property owners had proven no actual diminution in property value. First, the record did not show any specific economic loss, since it was not clear that *all* construction above the terminal was prohibited.[21] Second, state law provided a transferable development-rights program which permitted the appellant to transfer lost development rights above the terminal to other properties, "undoubtedly mitigat[ing] whatever financial burdens the [landmark preservation] law has imposed on appellant[]." 438 U.S. at 137. By contrast, this case involves a dramatic devaluation of the appellant's property, amounting to at least 60%.[22] Moreover, because no trans-

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[21] New construction that would "harmonize in scale, material, and character" with the existing structure, for example, was not precluded. 438 U.S. at 137.

[22] Where appellant could have constructed two 25-story commercial towers with an excess of 1,000,000 square feet of floor space, it may now build several three-story structures containing only 300,000 square feet of floor space. Tr. 177-178; Exh. KK. The undisputed evidence shows that these limitations diminish the value of appellant's property by at least 60 percent. *See supra* notes 12-13 and accompanying text.

ferable development rights program exists in this case, there is nothing to mitigate the financial burdens imposed by the SPEHA ordinance.

2. This case presents an excellent opportunity to explore the contours of the second *Penn Central* factor: interference with investment-backed expectations. Significant confusion has arisen concerning this factor. This may be because its definition requires a reconciliation of "what are sometimes characterized as two conflicting American ideals—the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other." J. Ely, *Democracy and Distrust*, 86-87 (1980). As a result, the creation of a distinct investment-backed expectation apparently requires something more than the mere knowledge that a certain type of development or property use is allowed by state law. This is because "government regulation—by definition—involves the adjustment of rights for the public good" and often "this adjustment curtails some potential for the use or economic exploitation of private property." *Andrus*, 444 U.S. at 65. Exactly what is required to create such an expectation, however, has never been specifically addressed by this Court. Review here will give the Court that opportunity.[23]

Appellant possessed the distinct, investment-backed expectation that it could fully develop its property consistent with applicable zoning regulations. Although appellant was certainly aware that the zoning regulations could change, appellant also had the right to rely on the

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[23] The closest this Court has come to defining investment-backed expectations was in *Kaiser Aetna v. United States, supra.* In that case, the Court held that consent of United States officials could "lead to the fruition of a number of expectancies embodied in the concept of 'property.'" 444 U.S. at 179. Beyond this and other similar statements, however, the Court has never elucidated the "investment-backed expectation" concept. *See, e.g. Ruckelshaus v. Monsanto Co., supra.*

established procedures applicable to such changes.[24] Thus, appellant could expect that its rights to develop its property under controlling zoning regulations would be altered only following an adequate hearing and review, during which the parties proposing any change would have the burden of proving that manifest error in the original zoning or changed conditions warranted the alteration. Code § 59-646, 647. This expectancy is substantial; a landowner is thereby assured that its land-use rights cannot be whisked away by passion, caprice or disregard for established procedural safeguards.[25]

Striking the balance between individual property rights and state power to act in the public good will always be problematic. But at least one thing is clear: while one cannot reasonably expect that the state will never alter

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[24] Under Colorado law, "when the matter is permitted by right in the zone created and either through an environmental concern or a change of circumstances the use is incompatible with prior usage, the proper procedure is to amend the zoning resolution." *Western Paving Construction Co. v. Board of County Commissioners of Boulder*, 506 P.2d 1230, 1232 (Colo. 1973) (en banc). *See also Vick v. Board of County Commissioners of the County of Larimer*, 689 P.2d 699, 702 (Colo. Ct. App. 1984) (where the zoning body has zoned property to permit a certain type of development but thereafter, for environmental reasons, "decides that the property is not suitable for such development, then a zoning resolution containing adequate standards should be adopted").

[25] The record here makes clear that the mountain view ordinance was a political short-cut to a land-use limitation that could not be readily obtained by SPEHA through the zoning process. The SPEHA ordinance failed all established criteria for the protection of a mountain view (*see supra* note 11 and accompanying text) and was recommended against by the Denver Planning Office and Planning Board (*id.*). The ordinance itself differs from all other mountain view provisions in that it permits a 42-foot building regardless of impact on the view plane, as well as permitting reconstruction of existing non-conforming commercial towers. App. F at 43a-44a. The apparent goal of SPEHA in drafting the ordinance was to downzone *de facto* commercial property—not protect a panoramic mountain view.

its property regulation, one can expect that no sudden changes in that regulation will occur by simple political fiat. Under the Takings Clause of the Fifth Amendment:

> what one primarily has a right to is the maintenance of the conditions of one's fair and effective participation in the constituted order, as an individual no less entitled than others to the respect and concern of the community, and also no more entitled than [others] to any particular outcomes save those that [bear on] the conditions of continued effective participation. Loss—even great loss—of economic value of one's [holdings may] not as such violate those conditions. What does, perhaps, violate them is exposure to sudden changes in the major elements and crucial determinants of one's established position in the world, as one has come . . . to understand that position.

F. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1112-1113 (1981) (quoting F. Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 Harv. Civ. Rts.—Civ. Lib. L. Rev. 296, 306 (1980)) (brackets in original). Thus, one reasonably expects state regulation of private property; but one also expects to participate, through the normal process, in the development of that regulation. If such is not the case, the state action may indeed interfere with the distinct investment-backed expectations created by the regulatory scheme itself.

Appellant lost valuable property rights protected by applicable zoning regulations because it is an out-of-state developer with plans opposed by a politically powerful group of local homeowners. The controversy between these parties was not resolved on its merits in a zoning proceeding where both sides would have had the opportunity to present their viewpoints and a public body would have had the duty of balancing all relevant considerations in the course of resolving the matter under the over-arching umbrella of the general welfare. Rather,

as the trial judge wrly noted, this is "one of those cases where these people [the landowners] don't have very many votes and the Southmoor Park East Homeowners Association has several hundred." App. B at 24a. Plenary review is warranted to clarify that the concepts of "justice and fairness" underlying the Takings Clause (*Penn Central*, 438 U.S. at 124) indeed protect investment-backed expectations created by government—here, zoning regulations—from untrammelled, standardless abrogation. *Cf. Kaiser Aetna*, 444 U.S. at 179-180.

3. Substantial economic harm and lost investment-backed expectations are often not decisive of a takings claim. "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis." *Keystone Bituminous Coal*, slip op. at 16. Here, the City of Denver has appropriated at least 60% of the value of appellant's property and dashed its investment-backed zoning expectations in furtherance of a purely aesthetic goal—preservation of a mountain view. Although in *Penn Central* the Court upheld a city ordinance promoting aesthetic values against a takings challenge, it did so in a context where no specific economic injury or lost investment-backed expectations had been shown. 438 U.S. at 136-137. This case presents the Court with a needed opportunity to clarify whether, in all circumstances and at all costs, the burden of preserving aesthetic values should be "borne by corporations" rather than "individual taxpayers." *Penn Central*, 438 U.S. at 152-153 (Rehnquist, J., dissenting).

"[N]ot every destruction or injury to property by governmental action" is a "'taking' in the constitutional sense." *Armstrong v. United States*, 364 U.S. 40, 48 (1960). Where the government need to regulate is "substantial," the Court has concluded that regulatory action "in many instances has not required compensation." *Keystone Bituminous Coal*, slip op. at 20. Thus, the Court

has recognized two relatively well-defined circumstances where governmental destruction of property interests does not violate the Takings Clause. First, a state may prohibit property use without effecting a taking if the forbidden use is dangerous to the safety, health, or welfare of others. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Second, a taking does not occur if the state prohibition applies over a broad cross section of society and thereby "secure[s] an average reciprocity of advantage." *Pennsylvania Coal*, 260 U.S. at 415.[26] Neither consideration justifies the uncompensated appropriation of appellant's property interests in this case.

The record is clear that the construction of two 25-story office buildings on appellant's property would be in full compliance with zoning, development, and other health and safety requirements. Thus, the SPEHA ordinance does not prohibit a nuisance. Instead, the City of Denver—at the behest of SPEHA—has acted to preserve what it believes to be scenic beauty. And, while enhancement of the "desirable aesthetic features of a city" may be a permissible goal (*Penn Central*, 438 U.S. at 129), not every means to that end comports with the dictates of the Takings Clause. Denver, because of its admiration for a mountain view, has decided that appellant must preserve that view for the benefit of local residents. But, unlike specific land-use regulations, this prohibition does not merely interdict appellant from using its property in a narrow set of noxious ways. Rather, while appellant may continue to use a portion of its land, the city has appropriated everything above 42 feet for public use. This is not, in short, the type of governmental action

[26] The Court has recently suggested that there is a close relationship between these two factors. When a state "restrains uses of property that are tantamount to public nuisances," such action is "consistent with the notion of 'reciprocity of advantage' . . . referred to in *Pennsylvania Coal*." *Keystone Bituminous Coal*, slip op. at 18.

where the Court is properly "hesitan[t] to find a taking." *Keystone Bituminous Coal*, slip op. at 18. It is, instead, a clear example of property being taken by restricting "the owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

Nor does the regulation apply over a broad cross section of society, thereby securing an average reciprocity of advantage for appellant. The Denver ordinance is not a zoning regulation.[27] It is legislation aimed specifically at appellant. It was passed by the city council as a direct result of public pressure. The ordinance, moreover, limits only future construction in the area. It allows existing structures in violation of the 42-foot requirement to remain, and even provides that these structures may be rebuilt to their present height if they are damaged or destroyed. App. F at 43a-44a. This frees existing high-rise buildings from the ordinance's restrictions, allowing those property owners—some of whom strongly advocated the ordinance—to gain all its benefits (principally, immunity from future competition) without giving up anything in return.[28] Thus, in reality, the ordinance adversely affects only appellant, Landmark and Shopping. Unlike zoning or other reciprocal regulations, where the burden of the restrictions is shared fairly evenly, appellant and two other landowners bear the entire brunt of the ordinance. Although the Takings Clause does not bar government from imposing "burdens . . . in excess of the benefits received" (*Keystone Bituminous*

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[27] Indeed, SPEHA first attempted and failed to change the applicable zoning laws. App. B at 17a-18a.

[28] The competitive burden placed upon appellant by the SPEHA ordinance is especially heavy. Directly across the street from appellant's Howard Johnson's motel—and plainly within the area regulated by the SPEHA ordinance—is a high-rise Marriott Hotel. Tr. 178. As a result, while appellant, in the name of scenic beauty, cannot develop its property to compete with the high-rise, Marriott can maintain perpetually its facility despite aesthetic impact.

Coal, slip op. at 19 n.20), this is exactly the type of extreme burden imposed on a few individuals in the name of the public good that the Clause does prohibit. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the Fifth Amendment prevents the public "from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him").[29]

II. THIS CASE WILL PERMIT THE COURT TO CLARIFY WHETHER THE CONSTITUTION MANDATES COMPENSATION IF LAND-USE REGULATIONS CONSTITUTE A TAKING

This case raises a vital issue the Court has unsuccessfully attempted to address five times in the past seven years: whether the Fifth and Fourteenth Amendments require compensation for a regulatory taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, No. 85-1199 (argued January 14, 1987); *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, *supra*; *San*

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[29] *See also Armstrong*, 364 U.S. at 49 (the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *Nashville, C. & St. L.R.R. v. Walters*, 294 U.S. 405, 429-430 (1935) ("While money raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit and indeed, suffer serious detriment, . . . so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them"). *Cf. Keystone Bituminous Coal*, slip op. at 19 n.20 ("Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received").

Diego Gas & Electric Co. v. City of San Diego, supra; Agins v. City of Tiburon, 447 U.S. 255 (1980). In each of these cases (except for *First English Evangelical* which is still awaiting decision), the compensation issue has eluded the Court because of doubt "regarding the antecedent question whether . . . property has been taken." *MacDonald, Sommer & Frates*, 106 S.Ct. at 2568-2569. Because there can be no doubt that the SPEHA ordinance, properly analyzed, results in a taking, this case presents the Court with the opportunity to answer the Fifth and Fourteenth Amendment compensation question.[30]

The question whether the Takings Clause requires compensation is, without doubt, an important one. The Court's failure to clarify the issue, moreover, has resulted in considerable disarray among the states concerning the appropriate remedy for land-use regulations that constitute a taking.[31] The present case is an appropriate vehicle for dispelling this confusion.

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[30] At this writing, the decision in *First English Evangelical* has not been announced. It has been argued, however, that the compensation issue is not properly presented there. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, No. 85-1199, Brief of Appellee at 14-29; *id.*, Brief For The United States As Amicus Curiae Supporting Appellee at 7-9. Should the Court reach and answer the compensation question in *First English Evangelical*, it would be unnecessary for the Court to address the second question presented by this Jurisdictional Statement.

[31] For example, compensation is apparently available in New Hampshire, North Dakota, and Rhode Island, but not in California, Connecticut, Florida or New York. *Compare Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981); *Sheerr v. Township of Evesham*, 184 N.J. Super. 11, 445 A.2d 46 (1982); *Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983); and *Annicelli v. Town of South Kingstown*, 463 A.2d 133 (R.I. 1983) *with Agins v. Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); *Dade County v. National Bulk Carriers, Inc.*, 450 So.2d 213 (Fla. 1984); *DeMello v. Town of Plainville*, 170 Conn. 695, 368 A.2d 71 (1976); *New York Tel. Co. v. Town of North Hempstead*, 41 N.Y.2d 691, 363 N.E.2d 694, 395 N.Y.S.2d 143 (1977).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
Appellant,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

SUPREME COURT
STATE OF COLORADO

Case No. 84SA400

December 2, 1986

LANDMARK LAND COMPANY, INC.,
Plaintiff-Appellant,

and

HARSH INVESTMENT CORP. and
SOUTHMOOR PARK SHOPPING, INC.,
Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER; THE CITY COUNCIL
OF THE CITY AND COUNTY OF DENVER,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, INC.,
and THOMAS P. MCCALLIN,
Intervenors/Defendants-Appellees.

Case No. 84SA410

HARSH INVESTMENT CORP.,
Plaintiff-Appellant,

and

LANDMARK LAND COMPANY, INC., and
SOUTHMOOR PARK SHOPPING, INC.,
Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER; THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, and its members, CATHY REYNOLDS, ROBERT CRIDER, WILLIAM A. SCHEITLER, T.J. HACKWORTH, M.L. SANDOS, PAUL A. HENTZELL, PAUL L. SWALM, JOHN J. SILCHIA, EDWARD F. BURKE, JR., KING M. TRIMBLE, SALVADORE CARPIO, CATHY DONOHUE, WILLIAM R. ROBERTS; THE HONORABLE WILLIAM H. MCNICHOLS, JR., MAYOR OF THE CITY OF DENVER; THE BUILDING DEPARTMENT OF THE CITY AND COUNTY OF DENVER, and JACK TANIGAWA, ACTING DIRECTOR OF THE BUILDING DEPARTMENT OF THE CITY AND COUNTY OF DENVER,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, INC., and THOMAS P. MCCALLIN,
Intervenors/Defendants-Appellees.

Case No. 84SA413

SOUTHMOOR PARK SHOPPING, INC.,
Plaintiff-Appellant,

and

HARSH INVESTMENT CORP. and
LANDMARK LAND COMPANY, INC.,
Pliantiffs,

v.

THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, a Municipal Corporation, and THE CITY AND COUNTY OF DENVER, STATE OF COLORADO,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, INC. and THOMAS P. MCCALLIN,
Intervenors/Defendants-Appellees.

Appeals from District Court, City and County of Denver
Honorable Warren O. Martin, Judge

EN BANC JUDGMENT AFFIRMED

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JUSTICE ROVIRA delivered the Opinion of the Court.

JUSTICE DUBOFSKY does not participate.

These three cases, which were consolidated before trial, all involve challenges to section 10-62.5 of the Revised Municipal Code of the City and County of Denver [Code], which extended mountain view protection to Southmoor Park in 1982. The three appellants, Harsh Investment Corp., Landmark Land Company, Inc., and Southmoor Park Shopping, Inc., own land in the area affected by section 10-62.5. They brought suit against the City and County of Denver alleging substantive, procedural, and constitutional defects in the ordinance. The trial court, hearing the case without a jury, held the ordinance was valid and dismissed all of the appellants' claims. The appeal comes directly to this Court because of the constitutional questions involved. § 13-4-102(1)(b), 6 C.R.S. (1973). We affirm the judgment of the trial court.

I.

The appellants have for years owned land in southeast Denver in an area bounded by Interstate 25 on the west, Hampden Avenue on the north, and Monaco Boulevard on the east. Much of this land is currently being utilized as commercial property, and the zoning classification covering it, B-3,[1] allows both residential and business (including office high-rise) use. Code §§ 59-306 *et seq.*

In 1980, Landmark announced plans to build a 21-story office building on its land, which the applicable zoning ordinance allows. No building permit was ever obtained by Landmark. The building proposal distressed many of the residents in the area, and, as a result, a neighborhood association, Southmoor Park East Homeowners Association, Inc., (SPEHA) opposed the proposed high rise development. Among other things, SPEHA submitted both rezoning and downzoning proposals for the area. After the enactment of section 10-62.5, the zoning proposals were withdrawn.

---

[1] The land of appellants Landmark and Southmoor Park Shopping is zoned B-3; the land of appellant Harsh is zoned R-4.

Section 10-62.5 itself was offered to the city council, through a councilman, at SPEHA's suggestion. The Denver Planning Board recommended against it; nonetheless, the city council adopted section 10-62.5 on July 19, 1982. No record of the discussion or enactment, other than the voting tally sheet, exists from the public hearing that was held.

Section 10-62.5 is an amendment to Denver's Mountain View Ordinance. Code §§ 10-56 *et seq.* (1986).[2] The amendment, with an incorporated map, covers several hundred lots in addition to the appellants' land. It provides maximum height for buildings on the west side of Southmoor Park, allowing more height the farther the buildings are located from a specified reference point within Southmoor Park.[3]

---

[2] The Mountain View Ordinance was originally passed in 1950. It is based on findings by the city council that the mountains were part of Denver's "unique environmental heritage" and that protection of mountain views would promote aesthetic enjoyment, tourism, and civic pride

The original ordinance protected the mountain view from five city parks. It was amended in 1983, adding two other parks to the list of protected view areas.

Since section 10-62.5 is simply an amendment to the original ordinance, the council did not need tc restate the reasons that mountain views are deserving of protection in the amendment itself; those reasons are implicitly incorporated into the amendment.

[3] The amendment provides, in part,

> (a) *Adoption of map.* The attached map shall be and hereby is approved and adopted . . . .
>
> (b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level plus two (2) feet for each one hundred (100) feet that said part of a structure is horiziontally distant from the reference point. . . .
>
> (c) *Reference point.* The reference point is a point having an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level . . . .

Code § 10-62.5.

However, there is an exception that allows a height of forty-two feet for any structure in an area zoned for business covered by the amendment. Code § 10-62.5(d)(1).[4] Subsection (d)(2) provides an exception for existing structures and also allows existing structures to be rebuilt to their present height if they are damaged or destroyed.

The appellants' complaints allege that the amendment was without basis in law and arbitrary, and therefore void. The complaints further state that the amendment substantially impairs the rights of the appellants, and, if valid, constitutes a taking requirement compensation. The appellants also request a permanent injunction restraining the city from enforcing the ordinance.

At trial, the court heard evidence on the procedure the city council had used in adopting the amendment. Although not required by law to do so, the council called a public hearing. Representatives of SPEHA and the appellants spoke. Representatives of the appellants had also voiced their concerns to the Denver Planning Board. The trial court also heard evidence on the amendment's effect on the mountain view, as well as its effect on the value of appellants' property.

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[4] As originally adopted, subsection (d)(1) provided a forty-two foot maximum for all structures in an area covered by § 10-62.5 and zoned for business. The city council changed subsection (d)(1) in July, 1984 (after the complaint had been filed, but before the trial had commenced), to provide, "[w]ithin any district zoned for business a structure[,] which[] under the terms of section 10-62.5 would be limited, may be constructed to a height of forty-two (42) feet above the natural grade." The trial court interpreted the amendment to allow structures in a business zone a height of forty-two feet or the height allowed by the gradation provided in subsection (b), whichever is higher. Although the change was noted in a stipulated pretrial order, the complaints were not amended to reflect the change. However, under either version of the ordinance, Landmark's proposed building is limited to considerably less that the twenty-one stories it wishes to build.

The trial judge viewed each of the parks covered by the ordinance and made an express finding that there was a "panoramic mountain view" from the sighting point in Southmoor Park. He held that the amendment was a valid exercise of police power and, although it substantially diminished the value of appellants' property, it did not take all value. Accordingly, the trial court dismissed all appellants' claims.

II.

The threshold issue is whether, in enacting the ordinance, the Council was acting in a legislative or in a quasi-judicial capacity. The city concedes that the procedures that must accompany quasi-judicial activity were not performed; therefore, if this amendment is quasi-judicial in nature, it must be overturned.

Denver's characterization of this amendment as legislation is not binding on this court. *City and County of Denver v. Eggert*, 647 P.2d 216 (1982). *Eggert* reaffirmed that,

> [i]n order to support a finding that the action of a municipal legislative body is quasi-judicial, all of the following factors must exist: (1) a state or local law requiring that the body gave adequate notice to the community before acting; (2) a state or local law requiring that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requiring the body to make a determination by applying the facts of a specific case to certain criteria established by law.

Snyder v. City of Lakewood, 189 Colo. 421, 425, 542 P.2d 371, 374 (1975).

In the case at bar, none of these tests are met. No state or local law requires a public hearing, notice

thereof, or an on-the-record determination by the city council. The fact the the city voluntarily held a hearing does not satisfy the test. *Margolis v. District Court*, 638 P.2d 297, 303 (1981) (dicta).

Further, this amendment fits squarely into our description of legislative action: it is prospective in nature, of general application, and requires the balancing of questions of judgment and discretion. *See Eggert*, 647 P.2d at 222. It does not pertain only to the immediate parties, as quasi-judicial acts typically do, *Eggert*, 647 P.2d at 222-23, but rather involves judgment based on possible future facts and is binding on all land that it affects, not just the land of appellants here.

A point could be reached where the 'legislation' is so narrow, so directly pointed at certain individuals, and so intertwined with an area that is usually judicial in nature that it would be quasi-judicial in character, even though it could satisfy the *Snyder-Eggert* test. However, this amendment, which is prospective, affects hundreds of lots and landowners, and concerns an area usually governed by legislation, does not reach that point.

We conclude this amendment is legislative in nature; thus the lack of quasi-judicial procedure does not invalidate it.

III.

Once it is established that the amendment is legislation, a presumption of constitutionality attaches; this presumption can only be overcome by proof beyond a reasonable doubt. *Mosgrove v. Town of Federal Heights*, 190 Colo. 1, 4, 543 P.2d 715, 717 (1975). Appellants have raised several arguments regarding the constitutionality of the amendment, but none establish that it is unconstitutional beyond a reasonable doubt. Absent fraud or clear abuse of discretion, the judicial branch should not interfere with legislative actions. *McCray v. City of Boulder*, 165 Colo. 383, 390, 439 P.2d 350, 354 (1977).

A.

Appellants' first assault on the constitutionality of section 10-62.5 stems from their characterization of the amendment as special legislation. Special state legislation is invalid, Colo. Const. art. V, § 25, and this prohibition has long ago applied to municipalities. *See City and County of Denver v. Bach*, 26 Colo. 530, 58 P. 1089 (1899). The amendment constitutes special legislation, in appellants' view, because it turns control of appellants' land over to SPEHA, and it includes an exception for already existing structures.

The claim that the City Council has turned control of appellants' land over to SPEHA is without merit. While SPEHA proposed and lobbied for the amendment, it was passed by the city council. Holding that the council thereby abdicated its responsibilities would defeat the entire purpose of having a republican form of government; i.e., for a legislature to evaluate competing interests and determine what was the best course of action based on those different interests.

Similarly, leaving exceptions for existing structures—and allowing them to be rebuilt to their current height if destroyed—merely represents a legislative determination that the view is now acceptable, but is not to be further derogated. Such nonconformance exceptions are common in other areas of land use regulation, such as zoning, and have been upheld. *See, e.g., Board of County Comm'rs of Boulder v. Echternacht*, 194 Colo. 311, 572 P.2d 143 (1977).

B.

Appellants' next constitutional attack claims that the amendment is neither rationally nor reasonably related to a legitimate public purpose.

It has been well established that protection of aesthetics is a legitimate function of a legislature. *See Berman v. Parker*, 348 U.S. 26, 32-33 (1954). Especially

in the context of Denver—a city whose civic identity is associated with its connection with the mountains—preservation of the view of the mountains from a city park is within the city's police power.

Appellants argue that SPEHA's reason for promoting the amendment was to protect the property values of its members' homes, not to protect the mountain view. Assuming that this is true, it does not affect the validity of the city council's action. The council enacted an amendment that is clearly directly related to preserving the mountain view—indeed, the gradations in allowable height based on distance from the sighting point are tailored to nothing else.

The forty-two foot exception, equal to approximately three commercial stories, also reflects a balancing of interests involved. Appellants may continue their present use of the land or change to another use, so long as their structures do not interfere with the view plane established by city council.[5] The ulterior motives of SPEHA are of no relevance.

C.

Appellants argue further that, even if the protection of the mountain view is a legitimate purpose, this must be accomplished by a formal rezoning. Once it is settled that protection of aesthetics is a legitimate function and it is clear that this amendment is related to that goal, the city is free to choose the method of implementing

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[5] With no record of council's deliberation, the forty-two foot height might appear to be arbitrary. However, the presumption of constitutionality attaches to this figure as well as the rest of the amendment. Appellants have not carried their burden of establishing that there is no rational basis for this exception. It is apparent, especially in light of the city council's amending of this provision two years after the adoption of section 10-62.5, that the height reflects a legislative decision on the best balance between the desire to promote commercial activity and the desire to protect the mountain view.

that goal, within the constitutional parameter that the enactment is not arbitrary or capricious.[6]

We upheld nonzoning restrictions on the use of property when the concern was a combination of health and aesthetics in *Mosgrove v. Town of Federal Heights*, 190 Colo. 1, 543 P.2d 715 (1975). There, a city ordinance required fencing around garbage containers and perimeters of multi-resident dwellings; we stated,

> [A] city may—in the exercise of that power—restrict the use of property in a manner that is not arbitrary or unreasonable and that bears a substantial relationship to a legitimate government concern.

190 Colo. 1, 4, 543 P.2d 715, 717 (1975). There is no reason to depart from this analysis simply because the "legitimate governmental concern" is slightly different here than in *Mosgrove*. *See also Collopy v. Wildlife Commission*, 625 P.2d 994 (Colo. 1981) (nonzoning restriction on property use upheld against constitutional attack).

Denver has other ordinances that restrict use, bulk, or density (the traditional zoning considerations) through methods other than zoning ordinances. *See, e.g.*, Code §§ 10-81 *et seq.* (restriction on structures in the civic center area); Code §§ 3-21 to 3-25 (restrictions on outdoor advertising along the South Platte River). Also, the state legislature has passed statutes controlling aspects of urban living that are usually regulated by local zoning ordinances. *See, e.g.*, § 25-12-101 et seq., 11 C.R.S. (1982 & 1986 Supp.) (noise abatement requirements).

Other states have allowed nonzoning height restrictions in an effort to protect aesthetics. *See, e.g., Polygon Corp.*

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[6] The city, of course, must also follow its own procedures. If this had been a zoning or rezoning, the city would have been bound by the procedures outlined in the city charter. *See Western Paving Construction v. County Comm'rs of Boulder*, 181 Colo. 77, 506 P.2d 1230 (1973).

v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978) (building permit for 13-story building, which complied with all applicable zoning laws, denied due to adverse (primarily visual) environmental concerns); *State of Washington, Dept. of Ecology v. Pacesetter Construction Co.*, 89 Wash. 2d 203, 571 P.2d 196 (1977) (nonzoning ordinance limiting buildings to 35 feet for aesthetic reasons upheld); *Piper v. Meredith*, 110 N.H. 291, 266 A.2d 103 (1970) (nonzoning height restriction based on aesthetics upheld); *Brougher v. Board of Public Works*, 107 Cal.App. 15, 290 P. 140 (1930) (nonzoning height restriction upheld despite landowner's contention that restrictions on height had to be enacted through zoning).

We conclude this amendment, aimed at protecting the view of the mountains from a city park, is substantially related to a legitimate governmental concern. The fact that the same goal might have been accomplished through other means does not alter this conclusion nor invalidate the restrictions.

D.

Appellants' final constitutional argument is that section 10-62.5 constitutes a taking of private property without just compensation.

It is the well-settled rule in Colorado that in order to establish that an ordinance which restricts the use of land is unconstitutional, it must be shown that the "ordinance precludes the use of [the] property for *any* reasonable purpose. [Citations.]" *Ford Leasing Development Co. v. Board of County Commissioners*, 186 Colo. 418, 426, 528 F.2d 237, 241 (1974) (emphasis in original); *see also Madis v. Higginson*, 164 Colo. 320, 434 P.2d 705, (1967) (due process and just compensation clauses of the Federal and State constitutions do not require that landowner be allowed to make the most profitable use of his property).

Appellants cannot meet this test as their present use of their land may continue under the amendment. They attempt to find a constitutional taking by distinguishing the cases requiring deprivation of all beneficial use of property and arguing that those cases involved a landowner bringing suit to change the zoning ordinance as it existed when the land was purchased.

Such a distinction is unpersuasive. Unless the owner has already established a use allowed under the previous ordinances but not allowed under the 'new' ordinances, the chronology of events is irrelevant. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) (upholding nonzoning land use restraint; "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . ."); *see also Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding law prohibiting landowner from continuing his otherwise lawful operation of a brickyard); *cf. Westwood Meat Market v. McLucas*, 146 Colo. 435, 361 P.2d 776 (1967) (same power that authorized zoning ordinances authorized modification of same unless vested rights affected).

The judgment of the trial court is affirmed.

JUSTICE DUBOFSKY does not participate.

APPENDIX B

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 82CV-6715, Courtroom 9

LANDMARK LAND COMPANY, INC.,
HARSH INVESTMENT CORP., and
SOUTHMOOR PARK SHOPPING, INC.,
Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendants,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION and
THOMAS P. MCCALLIN,
Intervenors-Defendants.

REPORTER'S TRANSCRIPT—August 15, 1984

The above-entitled matter came on this date before the HONORABLE WARREN O. MARTIN, District Judge, presiding in Courtroom Nine of the District Court.

APPEARANCES:

CHARLES E. NORTON—For Plaintiff Landmark
SUSAN E. BURCH

JEFFREY A. CHASE—For Plaintiff Harsh

JOSEPH J. BRONESKY—For Plaintiff Southmoor

ROBERT M. KELLY—For Defendants

JAMES M. LYONS—For Intervenors-Defendants

[2] PROCEEDINGS

(WHEREUPON, at 11:17 o'clock, a.m., court was reconvened with all parties present, and the following proceedings were had:)

THE COURT: Okay, this case concerns the validity of the Southmoor Park Mountain View Ordinance. This ordinance, which was adopted in July of 1982, provides in general that structures shall not be constructed which will block a mountain view from a point on the east side of Southmoor Park. It establishes a view plane from a point in the Park. It provides, as do the other mountain view ordinances, for a rise of the plane, and in this instance it provides that for each one hundred feet distance from this point a two foot rise in the plane. It also provides, in spite of this restriction, that within areas zoned for business a structure can be built at least to forty-two feet. As I construe it, it means that the ordinance provides for in business places that it can be at least forty-two feet unless the plane is higher, in which case it will be the higher limit. The ordinance further provides that existing structures can be rebuilt to the same height they are at the present.

The parties to this case are Landmark Land Company, Inc., plaintiff. Landmark is the owner of land bordered by [3] Monaco Boulevard and Valley Highway. Located on its property at the present time is the Continental Theater and an ice rink. These properties are located to the north of what was Jefferson Avenue. Landmark also owns land to the south of Jefferson Avenue, which is a substantial piece of land and presently vacant.

Harsh Investment Corp., another plaintiff, is the owner of the Howard Johnson Motel. Located also on this property is a restaurant and gasoline service station.

The third plaintiff is Southmoor Park Shopping, Inc., which is the owner of a shopping center located just east of the motel on Hampden Avenue.

All of these properties lie to the south of Hampden and to the east of the Valley Highway.

The defendants are the City and County of Denver and various of its officials.

Intervening as defendants are the Southmoor Park East Homeowners Association and Thomas M. McCallin. Southmoor Park Homeowners Association is a nonprofit corporation. Its members are people who reside in the Southmoor Park subdivision to the east of the Valley Highway. Mr. McCallin was an owner there and a member of the association.

The neighborhood is such that to the east of Monaco Boulevard in this area are single-family residences. The park itself is located on Poplar Street. That's about the [4] east margin of the park.

The factual background is this:

In the fall of 1981 Landmark took to the planning office of the City and County of Denver a preliminary plan of some kind to do construction on the land owned by it. The plans called for a twenty-one-story office building. The plan was to tear down the existing structures of the Continental Theater and the ice rink, to build a four-screen theater on Monaco Boulevard and place the office tower to the west of Monaco Boulevard in some location which I am not sure of because nobody has put in evidence what was submitted to the planning office.

This submission to the planning department became known to the Southmoor Park East Homeowners Association. They were unhappy with having a twenty-one-story office building constructed in their neighborhood. They were concerned about a number of things such as traffic and crime and perhaps also mountain view. They undertook to see if they could prevent the building of this office structure.

Among the things they did was to oppose the vacation of Jefferson Avenue, which was necessary under that particular plan. Thev also sought on two occasions to

have the property owned by Landmark downgraded in zoning. They were not successful in these efforts.

Then they came upon the idea somehow of getting [5] City Council to pass a mountain view ordinance which would in effect prevent the building of a structure of this height on the Landmark property. This was passed by City Council in July of 1982.

Prior to that this was considered by the planning office personnel. It was the recommendation of the planning office personnel that this mountain view ordinance not be passed. It was considered by the planning board by an eight to one vote. The planning board recommended that City Council not enact the ordinance. Nevertheless, City Council did, by a nine to three vote, enact the ordinance.

The question to be determined today is whether or not this ordinance is legal or illegal.

The first question is essentially a procedural one presented. And the issue is whether the action taken by City Council was quasi-judicial in nature or quasi-legislative in nature. It's not an issue that I've had much trouble with.

It does seem to me if City Council had undertaken to zone only the Landmark property or Landmark had gone in and asked for B-4 zoning that this is the kind of zoning that requires judicial action by City Council. On the other hand, if City Council passed an ordinance saying no wooden structures shall be built in the whole City of Denver, that's clearly legislative because it affects lots of people. And this seems to be the plain test in determining whether it's [6] judicial or legislative is how many people, how large of an area is involved.

It's clear to me that there are several hundred properties affected by the mountain view ordinance in this case both on the east side and the west side of the Valley Highway, many businesses as well as many residential properties. So it's been clear to me from the beginning that this was legislative action on the part of City Council and not judicial action. So they were not required to

go through all those procedures required of them when they're acting judicially. It's also clear if I'm wrong on that then City Council did not do those things necessary and it's acting in a judicial capacity.

All right, it seems to me there are essentially two questions involved, and that first one I've just cited. And the second one is whether or not the City properly exercised its police power in enacting this ordinance. Now in this connection, of course, plaintiffs have to make some showing that they are interested in this ordinance.

The vice-president of Landmark Land has testified that his property is worth substantially less with the mountain view ordinance than it was without it. Basically he said that office space in highrise offices could rent for more than office space in lowrise office buildings.

And officer from Harsh Investment Company, owners [7] of the motel, testified that his land was worth considerably less, perhaps nine million dollars less, and that they could not build as much building on this property as otherwise.

Mr. Van Holt Garrett, on behalf of Southmoor Park Shopping Center, has testified that his property is likewise worth less.

This testimony is undisputed. And we're not here to decide today how much less each of the properties is worth, but it seems to be undisputed that each of these properties is worth less than it was before adoption of the ordinance. And so I do make that finding and that the amount less is substantial in each instance.

Now it's clear to me that these three plaintiffs are not the only ones affected adversely by this ordinance. There are other businesses involved in the view plane and there are, of course, numerous residential properties involved; and all of those people are likewise affected by the ordinance.

It's also clear that there was not a complete taking of the three plaintiffs' properties. Their properties are still very valuable. As far as Harsh is concerned, we have

testimony it's worth six million dollars after passage of the mountain view ordinance. So it was not a complete taking of any property rights they have there. They still have very valuable property, and it will continue to be [8] valuable in the future.

Now I'm not sure what category they're arguing about, presented by plaintiffs, concerning following what the zoning requirements come under. But in any event, it's been raised as an issue that the City should have followed its own charter requirements and ordinance requirements in passing the mountain view ordinance because in effect it's a zoning ordinance. And I find against the plaintiffs on that issue.

It does seem to me that the City has a right to pass a separate mountain view ordinance without following the charter and ordinance requirements on zoning. The City has done this, as has been pointed out, on flood plane statutes and ordinances relating to flight patterns in Stapleton Airport. And the distinction that is sought to be made by plaintiffs is because this has to do with aesthetics and not health and welfare.

And I certainly agree with plaintiffs that when a new police power is recognized by courts, why, they tend for a few years to be more restrictive with these newly recognized police powers than they are with something that affects life or death. But a gradual process goes on in which the new police powers, in this case protecting views of the mountains, this process goes on so that these views are accorded the same rights to the government bodies as are accorded for something affecting flood planes.

[9] So I am unable to see any distinction between the right to enact mountain view ordinances and the right to enact flood plane ordinances. If I'm wrong that the zoning procedure should have been followed by City Council, by the rest of the government, why, then it's clear that these zoning procedures were not followed.

Basically there are two attacks on the police power in this case. One attack certainly relates to mountain view ordinances as a whole, and the second one relates to this particular mountain view ordinance.

And let me state that it's clear from the appellate courts that they don't think courts have a very large role to play in these things. And generally these matters are decided by the legislative body and the executive body and that the courts get involved in deciding these matters only in unusual circumstances, at least in overruling the legislative and executive bodies.

Now as far as mountain view ordinances in general, as stated by plaintiffs, the question is whether there is a rational relationship to any legitimate government purpose or interest. And so I think it's clear that in other parts of the country, why, view ordinances have been upheld. Certainly California. And it does seem to me that it is a legitimate government interest and purpose to protect views of mountains from Denver parks. And so I'm ruling that there [10] is the rational basis and that mountain view ordinances in general are valid.

Now the parties have stipulated that I go look at some parks where there are mountain view ordinances. If I can find my notes, I'll tell you what I saw.

Okay, as far as Ruby Hill Park is concerned, there's a mountain view ordinance in Ruby Hill Park, which is located at West Florida Avenue near South Osage Street. And I drove up to the top of the park, and there's a spectacular view in all directions from there—it's probably the best view of any of the parks—including a panoramic view of the mountains. There is another hill off to the southwest there on which the KVOD tower sits which does block some of the view to the west. And there are some foothill views blocked off to the west by three different highrise buildings. But as far as the tops of the mountains are concerned, why, there is nothing blocking them. There are some power poles and some high power lines which cross the view. They can be seen through. The

topography is such that there is a slope downward to the west.

Okay, State Home Park is located at East Iliff and South Emerson Street, apparently down in Harvard Gulch there. There is a little sign there near the pro shop designating the point from which the view is. The view is mostly straight to the west there, and trees to the north and south [11] block off a good bit of the view. So there's only a few degrees view either direction from this point. And some foothills views are blocked by Loretta Heights' big building out there and the Public Service smokestacks down on the river. The view's very nice but limited in range.

I went to Washington Park this morning.

Well, let me say as far as State Home Park the topography does slope downward to the west, although the Platte River is there.

At Washington Park theoretically there's a view. As a practical matter it's mostly blocked by trees this time of year.

And as to all the parks, any time you stand behind an evergreen tree you're not going to have a view. So I don't consider the vegetation as far as this particular view is concerned very significant.

It is possible to see some of the mountains from some locations from Washington Park.

Cheesemen Park. I didn't go over to the flag pole up between York and Josephine. I went this morning to the pavilion up there, and there is a nice view. And it's clear from looking that the Cheeseman Park View Ordinance affects an awful lot of people because the land to the west there—and there's nothing in the record but I'll state what I know—that land's zoned R-3 and R-4. And it's clear that [12] the ordinance affects lots of owners of land to the west of Cheeseman Park. And as to the desirability of mountain view ordinance, certainly that can be determined by looking west from the pavilion

because Bal Swan's highrise apartment building certainly sticks up like a sore thumb there.

As far as Southmoor Park is concerned, the photographs don't really depict very well the topography of the park itself. The high point is there along the left side of the photograph, and the park line drops over very sharply into a hole. As a matter of fact, it doesn't really look that steep in the photograph. And there is, I determine, a panoramic mountain view. I'm surprised because it doesn't really show very well in the photograph. But you can see all the way to Long's Peak and a long way south. The trees off to the south block Pike's Peak from the view, but there is a view of a lot of the mountains from that elevation of the park. Now as you go downward, why, you lose the view because it drops off so much. The topography of the land to the west of Southmoor Park is different than that of almost all the other parks in that some land lying to the west there is higher than the highest point of the park, and Southmoor Park is different in that respect.

Now the question is whether or not—well, let me say as far as the purposes set forth in ordinance 10-56, they are sufficient to allow adoption of the mountain view [13] ordinances. If those purposes are met, then the mountain view ordinance in my view is legal.

Now as far as whether all these purposes were met in Southmoor Park, why, it is questionable, as some of the witnesses have testified to, whether or not there is an attraction to tourists and visitors. I do notice that the individual defendant in his deposition did testify that he takes visitors and tourists over there from his house, but clearly it's not a big tourist attraction in Denver. And it does seem to me that on the whole the purposes set forth in ordinance 10-56 were met by 10-62.5, the Southmoor Park ordinance. So it does seem to me that the City Council and the Mayor properly exercised their police power in this case.

It may well be that I would have decided to vote differently in this case. Certainly the economic hardship to the plaintiffs in this case is substantial. And it may be one of those cases where these people don't have very many votes and the Southmoor Park East Homeowners Association has several hundred. Perhaps that was the motive for passing the ordinance. But in any event, I cannot look behind their motives or the reasons why City Council voted that way; and my role, limited role, is simply to decide whether the police power was properly exercised in this case. I determine that it was exercised properly.

So plaintiffs' complaint is dismissed.

[14] And will somebody on the defense side do a written order. You don't need to do findings or anything, just a written order.

Okay, anything I haven't decided I'm supposed to? I don't think I have to decide anything about estoppel since it wasn't raised or eminent domain since we don't get that far.

Okay, we'll be in recess.

MR. KELLY: Thank you, Your Honor.

(WHEREUPON, this trial was concluded).

* * * *

[15] CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, WESLEY P. MEGILL, Certified Shorthand Reporter in and for the State of Colorado, do hereby certify that I was the Official Court Reporter for Courtroom Nine, Denver District Court, on August 15, 1984, and that the foregoing transcript, pages 1 through 14 inclusive, being that portion requested by ordering counsel of the trial held on said date in Civil Action No. 82CV-6715, LANDMARK LAND COMPANY, INC., et al., vs. THE CITY AND COUNTY OF DENVER, et al, and SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, et al, is true and correct.

Dated at Denver, Colorado, this 16th day of August, A.D., 1984.

/s/ Wesley P. Megill,
WESLEY P. MEGILL, CSR

APPENDIX C

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO

Case No. 82CV6715

Courtroom 9

LANDMARK LAND COMPANY, INC., *et al.*,
Plaintiff,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendant.

ORDER

Judgment is entered in favor of defendants and against plaintiffs. The complaint is dismissed with prejudice. Defendants are to recover their costs.

This judgment replaces the one signed by the Court on August 23, 1984.

cc: Jeffrey A. Chase, Esq.
Robert M. Kelly, Esq.
James M. Lyons, Esq.
Charles E. Norton, Esq.
Joseph J. Bronesky, Esq.
Jane Ann Murphy, Esq.

DATED August 28, 1984

BY THE COURT:

/s/ Warren O. Martin
Judge

APPENDIX D

SUPREME COURT
STATE OF COLORADO

Case Nos. 84SA400, 84SA410 and 84SA413
Appeals, District Court, Denver County

LANDMARK LAND COMPANY, INC.,
Plaintiff-Appellant,

and

HARSH INVESTMENT CORP., *et al.*,
Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, *et al.*,
Intervenors/Defendants-Appellees.

HARSH INVESTMENT CORP.,
Plaintiff-Appellant,

and

LANDMARK LAND COMPANY, INC., *et al.*,
Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, *et al.*,
Intervenors/Defendants-Appellees.

SOUTHMOOR PARK SHOPPING, INC.,
Plaintiff-Appellant,

and

HARSH INVESTMENT CORP., *et al.*,
Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, *et al.*,
Defendants-Appellees,

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION, *et al.*,
Intervenors/Defendants-Appellees.

ORDER OF COURT

Upon consideration of the Petitions for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petitions shall be, and the same hereby are, denied.

BY THE COURT, EN BANC, DECEMBER 22, 1986.
JUSTICE DUBOFSKY does not participate.

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[SEAL]

APPENDIX E

SUPREME COURT
STATE OF COLORADO

Case Nos. 84 SA 400, 84 SA 410 and 84 SA 413

LANDMARK LAND COMPANY, INC.,
HARSH INVESTMENT CORP.,
SOUTHMOOR PARK SHOPPING, INC.,
Plaintiffs-Appellants,

v.

THE CITY AND COUNTY OF DENVER, THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, and its members, CATHY REYNOLDS, ROBERT CRIDER, WILLIAM A. SCHEITLER, T.J. HACKWORTH, M.L. SANDOS, PAUL A. HENTZELL, PAUL L. SWALM, JOHN J. SILCHIA, EDWARD F. BURKE, JR., KING M. TRIMBLE, SALVADORE CARPIO, CATHY DONOHUE, WILLIAM R. ROBERTS, THE HONORABLE WILLIAM H. MCNICHOLS, JR., MAYOR OF THE CITY OF DENVER, THE BUILDING DEPARTMENT OF THE CITY AND COUNTY OF DENVER, and JACK TANIGAWA, ACTING DIRECTOR OF THE CITY AND COUNTY OF DENVER,
Defendants-Appellees.

and

SOUTHMOOR PARK EAST HOMEOWNERS ASSOCIATION INC. and THOMAS P. MCCALLIN,
Intervenors/Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Harsh Investment Corp.,[1] appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Colorado affirming the judgment of the District Court, City and County of Denver, State of Colorado, dismissing appellant's claims, entered herein on December 2, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

HOLME ROBERTS & OWEN
JEFFREY A. CHASE (#5203)

/s/ Jeffrey A. Chase
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

Attorneys for Appellant

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[1] The following are subsidiaries of Harsh Investment Corporation: Claremont Hotel Corporation; Fountain Gallery of Art, Inc.; The Fountain Fine Arts, Inc.; Harsh Building Co.; King Tower, Inc.; MacArthur/Broadway, Inc.; Public Service Agency Co.; Regency Tower Corp.; and Harsh Colorado Corp.

Harsh Investment Corporation is a general partner in the following: Harsh Realty Co.; and Clay Tower Apartments.

AFFIDAVIT OF SERVICE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, J. Preston Stieff, depose and say that I am an attorney in the office of Holme Roberts & Owen, attorney of record for Harsh Investment Corporation, appellant herein, and that on March 2, 1987, pursuant to Rule 28.3, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the following by placing the same in the United States Mail, postage prepaid, properly addressed to:

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All parties required to be served have been served.

/s/ J. Preston Stieff

Subscribed and sworn before me on March 2, 1987.

/s/ Cheryl Graham
Notary Public

My commission expires: March 7, 1990.

APPENDIX F

BUILDINGS AND BUILDING REGULATIONS

ARTICLE IV. RESTRICTIONS ON STRUCTURES WITHIN AREAS NECESSARY TO PRESERVE MOUNTAIN VIEWS

Sec. 10-56. Purpose.

Upon consideration of a recommendation that an ordinance be enacted for the purpose of preserving and protecting the health, safety and general welfare of the people of the city and their property therein situate, the council finds:

(1) That the protection and perpetuation of certain panoramic mountain views from various parks and public places within the city is required in the interests of the prosperity, civic pride and general welfare of the people;

(2) That it is desirable to designate, preserve and perpetuate certain existing panoramic mountain views for the enjoyment and environmental enrichment of the citizens of the community and visitors hereto;

(3) That the preservation of such views will strengthen and preserve the municipality's unique environmental heritage and attributes as a city of the plains at the foot of the Rocky Mountains;

(4) That the preservation of such views will foster civic pride in the beauty of the city;

(5) That the preservation of such views will stabilize and enhance the aesthetic and economic vitality and values of the surrounding areas within which such views are preserved;

(6) That the preservation of such views will protect and enhance the city's attraction to tourists and visitors;

(7) That the preservation of such views will promote good urban design;

(8) That regular specified areas constituting panoramic views should be established by protecting such panoramic views from encroachment and physical obstruction.

(Code 1950, § 645.1)

Sec. 10-57. Prohibitions.

No land shall be used or occupied and no structure shall be designed, erected, altered, used or occupied except in conformity with all regulations established in this article and upon performance of all conditions herein set forth.

(Code 1950, § 645.3-1)

Sec. 10-58. Cranmer Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand four hundred thirty-four (5,434) feet above mean sea level plus one foot for each one hundred (100) feet that the part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the at-

tached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* Reference point is a point having an elevation of five thousand four hundred thirty-four (5,434) feet above mean sea level and established at the mountain view indicator in Cranmer Park, which point is identified on the attached map and which point is indicated in the aforesaid Cranmer Park by a cross set in the top step of the aforesaid mountain view indicator.

(Code 1950, § 645.4-1)

Sec. 10-59. Chessman Park—Botanic Gardens.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand three hundred eighty-three (5,383) feet above mean sea level plus one foot for each one hundred (100) feet that the part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* Reference point is a point having an elevation of five thousand three hundred eighty-three (5,383) feet above mean sea level and established at the flag pole at the Denver Botanic Gardens Overlook, which point is identified on the attached map.

(Code 1950, § 645.4-2)

Sec. 10-60. Ruby Hill Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand three hundred fifty-four (5,354) feet above mean sea level plus one and seven-tenths feet for each one hundred (100) feet that the part of a structure horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* A point having an elevation of five thousand three hundred fifty-four (5,354) feet above mean sea level, which point is identified on the attached map, at which point is located a steel rod set in concrete and which reference point is located as follows: Beginning at the southeast corner of the southwest quarter of the northeast quarter of Section 21, Township 4 South, Range 68 West; thence westerly along the land line a

distance of ten (10) feet; thence sighting west turn an angle of 90° 01′ 45″ to the north and a distance of eight and sixty one-hundredths (8.60) feet to the range point at the corner of West Florida Avenue and South Lipan Street; thence from that range point sighting west at an angle to the left of 38° 46′ 30″ for a distance of four hundred ninety and fifteen one-hundredths (490.15) feet.

(Code 1950, § 645.4-3)

Sec. 10-60.5. State Home Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching and as described in section 10-60.5(c)(2) shall be and hereby is determined to be and is designed as an area necessary for the preservation of a certain panoramic view to accomplish the purposes set forth in section 10-56. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand three hundred twenty-four and eight hundred seven thousandths (5,324.807) feet above mean sea level plus one and sevent-tenths (1.7) feet for each one hundred (100) feet that said part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Definitions of terms used.*

(1) *Reference point*: A point having an elevation of five thousand three hundred twenty-four and eight

hundred seven thousandths (5,325.807) feet above mean sea level, which point is identified on the attached map, at which point is located a brass cap set in concrete, and which point is located approximately six hundred seventy (670) feet east of the center line of South Logan Street and five hundred thirty (530) feet south of East Iliff Avenue.

(2) *Area designation*: An area enclosed by a line drawn from the reference point southerly to the center line of Yale Avenue and South Pearl Street, thence westerly along the Yale Avenue center line to the eastern boundary of the Ruby Hill mountain view designated area, hence northerly along the eastern boundary of the Ruby Hill mountain view designated area to the center line of West Evans Avenue, thence easterly along the center line of West Evans Avenue to the center line of the South Platte River, thence southeasterly to the reference point.

(Ord. No. 33-83, § 1, 1-24-83)

Sec. 10-61. State Capitol Area.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand two hundred eighty-six (5,286) feet above mean sea level plus one and seven-tenths feet for each one hundred (100) feet that the part of a structure is horizontally distant from the reference point. Wherever

a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* Reference point is a point having an elevation of five thousand two hundred eighty-six (5,286) feet above mean sea level, which point is located at the midpoint of the top step on the westerly exposure of the capitol of the state.

(Code 1950, § 645.4-4)

Sec. 10-61.5. Washington Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading and crosshatching and as described in section 10-61.5(c)(2) shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view to accomplish the purposes set forth in section 10-56. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of any structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand three hundred twenty-three and nine-tenths (5,323.9) feet above mean sea level plus one foot for each one hundred (100) feet that said part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of the section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Definitions of terms used.*

(1) *Reference point*: A point having an elevation of five thousand three hundred twenty-three and nine-tenths (5,323.9) feet above mean sea level located one hundred thirty (130) feet north and one hundred thirty (130) feet west of the intersection of the center lines of South Franklin Street and East Arizona Avenue at which point is located a brass cap set in concrete. Said point is identified on the attached map.

(2) *Area designation*: An area enclosed by a line drawn from the reference point southwesterly to the center lines of West Asbury Avenue and the South Platte River, thence northerly along the South Platte River center line to the West Florida Avenue center line, thence westerly along the West Florida Avenue center line to the center line of the South Lipan Street, thence northerly along the South Lipan Street center line to the center line of West Alameda Avenue, thence easterly along the West Alameda Avenue center line to the center line of South Logan Street, thence southeasterly to the reference point.

(Ord. No. 34-83, § 1, 1-24-83)

Sec. 10-62. City Park—Natural History Museum.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view. The restrictive provisions of this article shall be in full force and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by

shading or crosshatching shall exceed an elevation of five thousand three hundred three and ninety-three one-hundredths (5,303.93) feet above mean sea level plus one foot for each one hundred (100) feet that the part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* Reference point is a point having an elevation of five thousand three hundred three and ninety-three one-hundredths (5,303.93) feet above mean sea level and established as a point approximately two thousand seven hundred (2,700) feet north and one thousand (1,000) feet west of the southeast corner of Section 36, Township 3 south, Range 68 west of the 6th Principal Meridian, City and County of Denver, State of Colorado, more particularly described as follows: Such reference point is 198 feet south and 69 feet west of the northernmost west corner of the Museum of Natural History Building. At the reference point is a standard brass disc set in a concrete walkway, and is three (3.0) feet east of the west edge of said walkway. Such point is identified on the attached map.

(Code 1950, § 645.4-5)

Sec. 10-62.5. Southmoor Park.

(a) *Adoption of map.* The attached map shall be and hereby is approved and adopted and the portion thereon indicated by shading or crosshatching shall be and hereby is determined to be and is designated as an area necessary for the preservation of a certain panoramic view to accomplish the purposes set forth in section 10-56. The restrictive provisions of this article shall be in full force

and effect as to the portion of the attached map indicated by shading or crosshatching.

(b) *Limitations on construction.* No part of a structure within the area on the attached map indicated by shading or crosshatching shall exceed an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level plus two (2) feet for each one hundred (100) feet that said part of a structure is horizontally distant from the reference point. Wherever a structure lies partially outside and partially inside of the area on the attached map indicated by shading or crosshatching, the provisions of this section shall apply only to that part of the structure that lies within the area indicated on the map by shading or crosshatching.

(c) *Reference point.* The reference point is a point having an elevation of five thousand five hundred forty-eight (5,548) feet above mean sea level, which point is identified on the attached map, at which point is located the bronze marker set in concrete in the vicinity of Southmoor Park sign set in concrete and which references point is located as follows: A line from reference point at Southmoor Park to center line of Quincy Avenue and center line of Happy Canyon Road, along center line of Happy Canyon Road to center lines of Happy Canyon Road, Hampden Avenue and Dahlia Street, north along center line of Dahlia Street to center line of Yale Avenue, east along Yale Avenue to Monaco Street Parkway center line from a point at center line of Monaco Street Parkway and Yale Avenue center line back to reference point at Southmoor Park.

(d) *Exceptions.*

(1) Allowable height. Within any district zoned for business a structure which, under the terms of the section 10-62.5 would be limited, may be constructed to a height of forty-two (42) feet above the natural grade.

(2) Current uses. Any currently existing structure which would not be in compliance with this section may be replaced as necessary for its current height and use.

(Ord. No. 376-82. § 1, 7-19-82; Ord. No. 341-84, § 1, 7-2-84)

Editor's note—Ord. No. 376-82, § 1, adopted July 19, 1982, added § 645.4-6 to the 1950 Code; at the editor's discretion these provisions have been included as § 10-62.5.

Sec. 10-63. Enforcement.

(a) This article shall be enforced by the director of building inspection. The director is hereby empowered to enter into and cause any building, other structure or tract of land to be inspected and examined and to order in writing the remedy of any condition found to exist thereon or thereat in violation of any provision of this article. Service of the order shall be by personal service upon the owner, authorized property management agent, agent, occupant or lessee or, alternatively, service may be made upon such persons by certified mail. If such persons are not found, the order may be served by posting in a conspicuous place on the premises, in which event service shall be deemed complete as of the moment of posting.

(b) No oversight or dereliction on the part of the director of building inspection or on the part of any official or employee of the city shall legalize, authorize or excuse any violation of any provision of this article.

(Code 1950, § 645.2)

Sec. 10-64. Violations.

Any person or any officer, agent, member, servant or employee thereof, or any lessee or occupant of premises who violates, disobeys, omits, neglects or refuses to com-

ply with the provisions of this article, shall be guilty of violation thereof; and every omission, neglect or continuance of the thing commanded or prohibited for twenty-four (24) hours shall constitute a separate and distinct offense; provided, however, without affecting any penalty for a violation, no proceedings shall be instituted hereunder against an occupant who is not the owner, or against an agent, servant, employee or lessee for any violations hereof until after the expiration of ten (10) days from the date of the service of a notice by the director of such building inspection to cease and desist such violation, such notice to be served as provided in section 10-63.

(Code 1950, § 645.3-2)

Sec. 10-65. Remedies.

(a) Any person violating any provision of this article shall be subject to the penalties provided by section 1-13.

(b) In addition to any penalty the city or any person aggrieved by any violation of this article may maintain any appropriate action to prevent and restrain the violation including an action for injunctive relief and may apply for a temporary restraining order without posting bond.

(Code 1950, § 645.3-3)

Secs. 10.66-10.80. Reserved.

(3)

Supreme Court, U.S.
FILED
MAY 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
Appellant,
v.
CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

A. Whether a case challenging the constitutionality of a municipal land use ordinance is "ripe" for review when the party challenging the ordinance has not utilized available municipal procedures to obtain a permit or seek a variance from the ordinance.

B. Whether, on a facial challenge, a party whose property is valued at a minimum of $6 million and whose present use of the property is unimpaired after an ordinance is enacted can assert that the ordinance effects a "taking" of its property.

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On Appeal from the Supreme Court, State of Colorado

MOTION TO DISMISS OR AFFIRM

Appellees, the City and County of Denver, the Mayor, City Council and its members, Building Department and Acting Director of the Building Department of the City and County of Denver, the Southmoor Park East Homeowners' Association ("SPEHA") and Thomas P. McCallin, respectfully request this Honorable Court to dismiss this appeal for lack of jurisdiction on the grounds that the controversy is not ripe for resolution in this Court, because the appeal does not present a substantial federal question, or the federal questions presented are so unsubstantial as to require no further argument, or in the alternative, to affirm the decision of the Colorado Supreme Court.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A. Statement of the Facts

This case challenges the constitutionality of a Denver Municipal Ordinance enacted to preserve the mountain views from various Denver parks by limiting the height of numerous residential and commercial buildings within the view-plane of the parks to a level that does not block the view. Appellant Harsh Investment Corp., which at no time material to this action has had any plans to develop its property, seeks to have this Court rule that Denver is precluded from enacting an ordinance designed to preserve the natural beauty of the environment of its citizens, because the ordinance reduces its profit expectation.

Throughout this century, Denver has recognized the importance of mountains to its heritage. Like landmarks in other cities, the mountains in Colorado enhance the quality of life for all, represent the lessons of the past, and embody precious features of our heritage. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 108 (1978). With Denver's rapid growth in the late 1960s, the City Council enacted Section 10-56 (the "Mountain View Ordinance") of the Denver Municipal Code (hereinafter cited as "Code") to save Denver's mountain views. The stated purposes of the Mountain View Ordinance are to perpetuate the prosperity, civic pride, and general welfare of the people; to perpetuate the enjoyment and environmental enrichment of Denver's community and of visitors to Denver; to strengthen Denver's heritage as a city of the plains at the foot of the Rocky Mountains; to foster civic pride in Denver's beauty; to stabilize and enhance the aesthetic and economic vitality of the area whose views are preserved; to protect and enhance the city's attraction to tourists; and to promote good urban design (Code § 10-56). The original Mountain View Ordinance protected the views from

five parks: Cranmer Park (Code § 10-58), Cheesman Park (Code § 10-59), Ruby Hill Park (Code § 10-60), the State Capitol (Code § 10-61), and City Park (Code § 10-62). Later amendments added State Home Park (Code § 10-60.5), Washington Park (Code § 10-61.5), and Southmoor Park (Code § 10-62.5).

The City Council voted to include Southmoor Park within the purview of the Mountain View Ordinance when it enacted Section 10-62.5 (the "Southmoor Park Amendment") in July 1982. Appellant in this case, Harsh Investment Corp., owns commercially zoned property in a small portion of the area affected by the Southmoor Park Amendment (Tr. at 337, 340). The property in question is currently occupied by a Howard Johnson Restaurant and Motor Lodge under a long-term lease with Harsh (Tr. at 173). The Southmoor Park Amendment permits Harsh to build up to a height of 42 feet on its property (Code § 10-62.5), which is consistent with surrounding commercial development (Tr. at 163). Harsh has never applied for a building permit on its property (Tr. at 194), and admitted at trial that it had no development plans for the property (Tr. at 190). The Southmoor Park Amendment has no impact on Harsh's current use of its property, and the present value of Harsh's property, with the amendment in place, is at least $6 million (Tr. at 185).[1]

Southmoor Park is the only park in southeast Denver protected by the Mountain View Ordinance (Tr. at 150).

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[1] Harsh's Jurisdictional Statement (hereinafter cited as J.S.) asserts that Harsh established the loss in investment expectation value to its property by "expert calculations." (J.S. at 9). This is an apparent reference to "damage" testimony presented by Harsh at trial. Of the three plaintiffs, only Harsh presented such testimony. Bennett Wright, Vice-President of Harsh, testified as to his estimate of the value of Harsh's property. Mr. Wright was never qualified as an expert, his testimony was plainly self-serving, and no independent testimony or valuation was offered at any time as to the value of Harsh's property.

It is a multi-use park containing two baseball fields, football fields, picnic tables, and a playground (Plaintiff's Exhibits II and JJ, p. 6).[2] It is used frequently for events such as athletics, Denver school outings, picnics, and band concerts (Tr. at 151, McCallin Depo. at 22-23).[3]

The trial judge, after observing the mountain views from each of the protected parks, stated that:

> As far as Southmoor Park is concerned . . . there is, I determine, a panoramic mountain view. . . . [Y]ou can see all the way to Long's Peak and a long way south. The trees off to the south block Pike's Peak from the view, but there is a view of a lot of the mountains from that elevation of the park.

Tr at 346. Similarly, the developers' own witnesses conceded at trial that Southmoor Park offers a clear view of the front range (Tr. at 65, 105, 235, 269). On a clear day an observer can see the Devil's Head formation, Lookout Mountain (the burial site of Buffalo Bill), the Mother Cabrini Shrine, and Red Rocks Park (McCallin Depo., p. 12).

From the first stages of its development in the mid-1960s, the Southmoor Park neighborhood was promoted and marketed for the magnificent mountain views it offers. (Exhibits 00, 26, 27). When local residents became aware of Landmark Land Company's ("Land-

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[2] Harsh claims that before the Southmoor Park Amendment, all protected views were from areas with "significant regional and scenic importance," and that Southmoor Park has no such importance. J.S. at 5 n.7. This argument is not supported by the record. Indeed, the record reveals that the city classifies two of those parks, Cheesman Park and Cranmer Park "neighborhood parks," the same classification given Southmoor Park, and Ruby Hill Park as a "community park." Plaintiffs Exhibit JJ.

[3] By stipulation of the parties at trial, the parties designated deposition testimony rather than calling certain witnesses. The cited deposition testimony is, therefore, part of the record.

mark") plan to build either one or two high rises which would obstruct the view of the mountains, they proposed the Southmoor Park Amendment.[4] The record reflects that the citizens immediately became concerned with the threatened destruction of their views (Tr. at 34, 35, Bradley Depo. p. 70, Plaintiff's Exhibits G, H). Support for the amendment was not limited to a small, localized group; community groups throughout metropolitan Denver voiced their support of the amendment, and appeared before the Denver City Council to urge its passage (Tr. at 67; McCallin Depo. p. 78; Reynolds Depo. p. 27, 29; Defendant's Exhibit 20 p. 4; Cert. Record of City Council Proceedings, Letter from Pine Valley Homeowners).

Harsh and other developers[5] joined with other powerful members of Denver's business community to launch a vigorous campaign in opposition to the Southmoor Park Amendment, lobbying the Denver Planning Board, the City Council and the Mayor's office in an effort to prevent the Southmoor Park Amendment from passing (Tr. at 68-70, 160, 192-94; Defendant's Exhibits 2-22). Although Harsh's Jurisdictional Statement contains a long passage about how the Homeowners' Association supposedly railroaded the Southmoor Park Amendment

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[4] The Jurisdictional Statement suggests that Harsh was the target of a rezoning effort by the homeowners. The only rezoning applications filed by SPEHA applied to the property of Landmark, who is not a party to this appeal. Furthermore, SPEHA's efforts to rezone Landmark's property are utterly irrelevant to this proceeding. Harsh does not contend here, as it did unsuccessfully in front of the Colorado Supreme Court, that zoning procedures should have been followed to enact the Southmoor Park Amendment. From a "taking" standpoint, it is immaterial whether a municipality's action is zoning or not.

[5] Two other developers, Landmark and Southmoor Park Shopping, Inc. ("Shopping"), joined in the campaign and later sued to challenge the ordinance. Their lawsuits were consolidated with Harsh's at trial and again on appeal to the Colorado Supreme Court. Landmark and Shopping have not joined in the appeal to this Court.

through the City Council, Harsh in no way challenges the procedures involved in the enactment of the amendment.[6]

The Southmoor Park Amendment was introduced before the Denver City Council on first reading on June 22, 1982. Although the procedural standards of the Mountain View Ordinance do not require that the Denver Planning Board meet to consider amendments to the ordinance, the Denver Planning Board held a public hearing on July 7, 1982, at the request of Landmark and recommended that the City Council reject the amendment (Defendant's Exhibit 4, Bradley Depo. p. 15). Harsh and the other developers were represented at that meeting, both individually and by counsel. Following a presentation by the developers, the Planning Board applied its criteria, which are "general guidelines rather than restrictive standards" (Plaintiff's Exhibit CC), and rec-

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[6] Harsh argues that the Southmoor Park Amendment is aimed specifically at its property. J.S. at 22. The trial court, however, expressly found that the amendment affects "several hundred properties" (Tr. at 340). Landmark, who is not a party to this appeal, was the only developer with any sort of development plan. Whether a view merits protection, the maximum height of buildings, and the amount of property to be restricted in order to preserve the view are matters of purely local concern. As this Court wrote in *Welch v. Swasey*, 214 U.S. 91 (1909):

> In passing upon questions of this character as to the validity and reasonableness of a discrimination or classification in relation to limitation as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the state where the law is to become operative,—whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare—are all matters which the state court is familiar with; but a like familiarity cannot be ascribed to this court, . . ."

Id. at 105.

ommended that the City Council not pass the amendment (Tr. at 105, 128; Defendant's Exhibit 19).[7]

Although the City Charter does not require the City Council to hold public hearings for amendments to the Mountain View Ordinance, the City Council held a hearing on July 12. Before the hearing, Harsh, Landmark and Shopping met and/or corresponded with each member of the City Council and with the Mayor to voice their opposition to the amendment (Tr. at 68, 160, 192-93; Defendant's Exhiibt 3, 5-18). In addition, Harsh tried to enlist the help of prominent members of the local business community to defeat the amendment (Tr. at 193-94). Officials of the developers spoke against the amendment at the hearing, and the developers were represented by their attorneys and a private consultant (Cert. Record of City Council proceedings, Minutes of July 12th meeting). Many Council members visited the park before voting on the amendment (Scheitler Depo. p. 4; Reynolds Depo. p. 7; Sandos Depo. p. 9; Crider Depo. p. 12; Donahue Depo. p. 11), and the amendment passed by a 9-3 vote.

After the City Council passed the amendment, the developers unsuccessfully sought a mayoral veto. The record reveals that Harsh had full and complete access to the political process, including a planning board hearing, a full city council hearing, and extensive lobbying. Throughout the period before the Southmoor Park Amendment was enacted, while the amendment was pending before the City Council, and since the enactment of the Southmoor Park Amendment, Harsh has never submitted any development plans, applied for any building permits, or sought a variance from the height ordinance (Tr. at 190).

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[7] Harsh again exaggerates the record, claiming that the "Planning Office found that Southmoor Park failed to meet the established criteria it had applied to all previously protected areas." J.S. at 6. The record shows, however, that the criteria were established only as a reaction to the proposed Southmoor Park Amendment, Tr. at 120-22, and were not binding. Tr. at 128.

B. Proceedings Below

Following passage of the Southmoor Park Amendment, Harsh sued in the District Court for the City and County of Denver, asserting that the mere passage of the Ordinance constituted a *de facto* rezoning of its property, and that proper zoning procedures were not followed. Harsh asserted that the City Council used its legislative power to perform what should have been a judicial function, with the attendant notice, hearing and application of fact to existing legal criteria. Harsh's lawsuit was consolidated with those of Landmark and Shopping. SPEHA and Thomas P. McCallin, a Southmoor Park homeowner, intervened as defendants with the City and County and certain of its officials.

At trial, Harsh, Landmark, and Shopping received a full and complete hearing on the merits. Plaintiffs presented extensive testimony concerning the history and purposes of the Mountain View Ordinance and the Southmoor Park Amendment, and the alleged political maneuvering by the homeowners and the developers before the amendment was passed. At the request of all parties, the trial judge conducted a "view" of Southmoor Park and each of the seven other parks with protected mountain views. The trial judge found that under Colorado law zoning or rezoning procedures did not apply to the enactment or amendment of the Mountain View Ordinance, and that the City could, under its police power, properly enact or amend the ordinance in its legislative capacity. The trial judge found that there is a panoramic mountain view from Southmoor Park (Tr. at 346), and concluded that the purposes of the Mountain View Ordinance were fully met and satisfied by the Southmoor Park Amendment.

The judge noted that the value of Harsh's property was not an issue before the court (Tr. at 341), but found that although the property was worth less than before the amendment was enacted,

> [i]t is also clear that there was not a taking of the three plaintiffs' properties. These properties are still very valuable. As far as Harsh is concerned we have the testimony it's worth six million dollars after passage of the Mountain View Ordinance. . . . They still have very valuable property, and it will continue to be valuable in the future.

(Tr. at 341-42)

The consolidated cases were then appealed to the Colorado Supreme Court. The Colorado Supreme Court unanimously affirmed, holding that under state law, the Southmoor Park Amendment was legislative in nature, a proper exercise of the City's police power, and substantially related to a legitimate government concern. Finally, the Colorado Supreme Court held that because Harsh's present uses of its property could continue under the amendment, no property was unconstitutionally taken:

> Appellants cannot meet this test (i.e., unconstitutional taking) as their present use of their land may continue under the amendment. They attempt to find a constitutional taking by distinguishing the cases requiring deprivation of all beneficial use of property and arguing that those cases involved a landowner bringing suit to change the zoning ordinance as it existed when the land was purchased.
>
> Such a distinction is unpersuasive.

Landmark Land Co. v. City and County of Denver, 728 P.2d 1281, 1287 (Colo. 1986).[8]

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[8] Harsh presents this case as an opportunity for the Court to consider what it characterizes as Colorado's "rigid 'no value' test": whether Denver has taken all value from Harsh's property. J.S. at 13-15 & n.20. The quoted language of the Colorado Supreme Court opinion reveals that the court looked instead to Harsh's continuing unimpaired use of its property. Moreover, in footnote 20, Harsh cites two cases from other states which purportedly apply "no value" tests, both of which were appealed to this Court, which dismissed each appeal for want of a substantial federal

ARGUMENT

I. The Appeal Should Be Dismissed For Lack Of Jurisdiction Because Harsh's Taking Claim Is Not Ripe Until Harsh Is Refused A Building Permit, Applies For A Variance, And Exhausts All Available Administrative Remedies.

The constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 294-95 (1981). Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. *Id.* An "essential prerequisite" to the assertion of a takings claim is a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2566 (1986). In *Hodel*, this Court concluded that "mere enactment" of legislation does not "affect a taking of private property." 452 U.S. at 297, n.40. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court held that until a developer submits a plan for development of its property, there is no "concrete controversy" regarding the application of specific zoning provisions. *Id.* at 260. Before a takings case is ripe for review in this Court, a landowner must exhaust his administrative remedies, including applying for a building permit and exhausting municipal variance procedures. The uncontroverted record establishes that Harsh has not done so, and this case is therefore not ripe for review.

In both *Hodel* and *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985),

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question. *Commonwealth v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378 (Ky. 1984), *appeal dismissed*, 105 S. Ct. 3549 (1985); *State v. Good Samaritan Hospital*, 299 Md. 310, 473 A.2d 892 (1983), *appeal dismissed*, 469 U.S. 802 (1984).

landowners challenged legislation on the ground that it constituted either a "taking" of private property without just compensation in violation of the Fifth Amendment, or a deprivation of property without due process in violation of the Fourteenth Amendment. In both cases, this Court held that the cases were not ripe because, as in the instant case, the landowners had not sought variances from the legislation in question. *Hodel*, 452 U.S. at 297; *Williamson County*, 473 U.S. at 186. Not only has Harsh failed to seek a variance but it has not even applied for a building permit and concedes that it has no immediate development plans (Tr. at 190).

Hodel involved a challenge to the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201, *et seq.* (1976 & Supp. III) which requires, *inter alia*, that coal miners restore land to its original condition after mining it, and prohibits mining in certain locations. 452 U.S. at 269. The district court found that it was "economically and physically impossible" to restore mines on steeply sloped property to their original condition. *Id.* at 293. This Court held that the taking issue was not ripe for judicial resolution because

> There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515(d) or a waiver from the surface mining restrictions in § 522(e). If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions.

Id. at 297.

Similarly, in *Williamson County* a developer challenged a change in a zoning ordinance as a "taking" in violation

of the Fifth and Fourteenth Amendments. Following the zoning change, the developer submitted a revised preliminary plat to the regional planning commission. The commission rejected it, raising eight specific objections. Based on the objections, the developer claimed that the zoning change reduced the number of housing units he could build on his property from 736 to 67.[9] 473 U.S. at 182. Williamson County has a board of zoning appeals which has the power to grant variances which could have resolved at least five of the commission's eight objections. *Id.* at 3117-18. The developer, like Harsh, sued precipitously without seeking variances from either the commission or the board of zoning appeals. Because the developer did not seek the variances, this Court held that its claim was not ripe.

This case requires the same result as *Hodel* and *Williamson County*. Denver also has a variance procedure which Harsh did not even attempt to follow. In fact, Harsh has made no effort to develop its property, as did the developer in *Williamson County*. Harsh admitted at trial that it has no immediate plans to develop its property (Tr. at 190), and that, at the time of trial, the property was leased, including an option to renew, until 1991 to Howard Johnson for a 186-room motel with a restaurant, cocktail lounge, and gasoline service station (Tr. at 173, Exhibit 25). Article III of Chapter 41 of the Code establishes a Board of Plan Enforcement Review and Variation which has the power to grant variances from the Mountain View Ordinance and the Southmoor Park Amendment. Section 41-74 provides that the Board has the power:

> [t]o authorize, upon appeal in specific cases, such variations from the terms of Chapter 10, subject to the terms and conditions fixed by the Board, as will not be contrary to the public interest where, owing to

[9] Other testimony asserted that the developer could build as many as 300 units. 473 U.S. at 182 (1985).

> exceptional and extraordinary circumstances, literal enforcement of Chapter 10 would result in unnecessary hardship.

Code, Section 41-74, attached as Appendix A.[10] At this stage, Harsh is, as the Court wrote in *Agins*, "free to pursue (its) reasonable investment expectations by submitting a development plan to local officials," 447 U.S. at 262, applying for a building permit, and seeking a variance—all of which it must do before presenting this Court with a ripe, concrete controversy. As the Court wrote in *Williamson County*, "whether the property taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, it is impossible to determine the extent of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations." 473 U.S. at 192 n.12.

II. The Southmoor Park Amendment Does Not Deny Harsh The Economically Viable Use Of Its Land.

In view of the foregoing, Harsh raises no substantial federal question, and presents no issues that have not been settled under well-established case law. Harsh's only challenge to the amendment is that it is facially invalid. *See Keystone Bituminous Coal Association v. DeBenedictus*, 107 S. Ct. 1232, 1247 (1987). As Harsh concedes, the test in a facial challenge is straightforward: "[a] statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'" J.S. at 106 n.14 (quoting *Keystone*, 107 S. Ct. at 1247 and *Hodel*, 452 U.S. at 295-96). This test presents a challenger with an

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[10] Appellees wish to bring to the Court's attention, pursuant to F.R.E. 201(b) and (f), that the Denver Board of Plan Enforcement Review and Variation has granted variances from the Mountain View Ordinance to permit buildings which intrude in the view plane. *E.g.*, Terracentre Association (4/9/81); United Bank of Denver and Gerald Hines (jointly) (1/17/80).

"uphill battle" which is "made especially steep" where, as here, the petitioner has not claimed that its *existing use* of the property is commercially impracticable. *Keystone*, 107 S. Ct. at 1247. The record is undisputed that Harsh's existing property uses are unimpaired by the amendment (Tr. at 187), and that its property value with the Southmoor Park Amendment exceeds $6 million (Tr. at 185).

Harsh does not assert that the Mountain View Ordinance is an invalid exercise of the police power. Nor is it an unconstitutional taking. It is well settled that the fact that an ordinance deprives a property owner of its most beneficial use of its property does not render the ordinance unconstitutional. *E.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). An ordinance may deprive a landowner of as much as 92½ percent of his property value without constituting a taking. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The Court has sustained as a valid exercise of police power,[11] city ordinances restricting building height, *Welch v. Swasey*, 214 U.S. 91 (1909), establishing setbacks, *Gorieb v. Fox*, 274 U.S. 603 (1926),[12] and implementing other restric-

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[11] This Court has written that the values represented by police power are "spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) ("The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.").

[12] *Gorieb* also relied on principles of comity and federalism to uphold the setback ordinance:

> State legislature and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their

tions which deprive a landowner of uses of air space above his property. *E.g., Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978).[13]

In *Penn Central*, this Court confirmed that states and cities may, as a legitimate exercise of their police power, restrict uses of land to preserve the character and aesthetics of a community. "Before considering these, we emphasize what is not in dispute . . . . this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city . . ." 438 U.S. at 129 (citations omitted). The Court in *Penn Central* upheld a landmark preservation law against landowners' contentions very similar to those made by Harsh in this case, i.e., that the law imposed disproportionate burdens on them, appropriated the airspace above their property,

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conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

274 U.S. at 608; *see also Welch v. Swasey*, 214 U.S. 91, 105-07 (1909). As Justice Marshall has written, the role of the Supreme Court is not to "sit as a zoning board of appeals." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

[13] States have long been mindful of the necessity of height restrictions in various settings. As early as 1885, an amendment to the New York tenement house laws restricted the height of all residential buildings to 80 feet on streets over 60 feet wide. New York Laws, Ch. 454 (1885). In Massachusetts, an 1895 statute permitted towns to limit the height of buildings near parks to 70 feet, with exceptions for steeples and domes. Mass. Gen. Laws, Ch. 13 (1896); Ch. 379 § 1 (1897). Contemporary examples of such regulations abound; cases in California, Connecticut, Hawaii, Illinois, Iowa, Florida, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Vermont, Virginia, Washington and Wisconsin have all upheld height restrictions. R. Anderson, *American Law of Zoning 3d* §§ 9.54, 9.55 (1986); A. Rathkopf and D. Rathkopf, *The Law of Zoning and Planning* § 34.05 (1987); N. Williams, *American Planning Law*, Ch. 67 (1985). *See also, Cochran v. Preston*, 108 Md. 220, 70 A. 113 (1908) (upholding height limitation in the area surrounding the Washington Monument).

and significantly diminished their property value. The Court rejected Penn Central's argument that it had been wholly deprived of a discrete segment of its property, the airspace above it:

> [T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of all rights, but also in approving those prohibiting both the subjacent and the lateral development of particular parcels. "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.

Id. at 130 (citations omitted). Last term, the Court, upholding restrictions on the location of adult movie theatres, reaffirmed that "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 930 (1986) (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80 (1974) (Powell, J., concurring)).

Under *Keystone*, Harsh raises a federal question only if it meets a simple, but strict test: whether the Mountain View Ordinance deprives Harsh of economically viable use of its land. Harsh ignores the *Keystone* test and asks the Court to look to the amendment's "interference" with Harsh's "investment-backed expectations." (J.S. at 10, 11).[14] Harsh, however, presented no testi-

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[14] Harsh asserts that Denver has "plucked strands" from Harsh's "bundle of rights" by depriving it of estimated future profits (J.S. at 10-11). As strands go, however, the loss of future profits is "a slim reed upon which to rest a takings claim." *Andrus v. Allard*, 441 U.S. 51 (1979). Harsh's present use of its property, which must be considered its primary expectation concerning the use of its property, *Penn Central*, 438 U.S. at 136, is unimpaired.

mony as to its investment-backed expectations. The only testimony it presented as to the value of its property consisted of the surmise and speculation of one of its corporate officers. Harsh offered no testimony as to its plans for the property beyond the terms of the Howard Johnson lease. With no development plans, its existing use of its property unimpaired and its property valued at six million dollars, Harsh cannot argue that it has been deprived of economically viable use of its land and thus fails to satisfy the threshold test of *Keystone*.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction because it is not ripe. The appeal also does not raise a substantial federal question. For the reasons stated above, this Court should dismiss this appeal or affirm the decision of the Colorado Supreme Court.

Dated this 20th day of May 1987.

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APPENDIX A

Sec. 41-74. Powers.

Subject to the limitations enumerated herein, the board of plan enforcement review and variation shall have and exercise the following powers in connection with chapter 10 but with no other portion, of this Code. In the exercise of its powers, the board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and, to that end, shall have all the powers of the officer or department from whom the appeal is taken.

(1) *Administrative review.* To hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of chapter 10.

(2) *Variations.* To authorize, upon appeal in specific cases, such variations from the terms of chapter 10, subject to terms and conditions fixed by the board, as will not be contrary to the public interest where, owing to exceptional and extraordinary circumstances, literal enforcement of the provisions of chapter 10 would result in unnecessary hardship. Every variation authorized hereunder shall not be personal to the applicant therefor, but shall be transferable and shall run with the land. No variation shall be authorized hereunder unless the board shall find that all of the following conditions exist:

a. That the use proposed by the applicant is a permitted use in the zoning district applicable to the subject land;

b. That literal enforcement of chapter 10 would preclude a reasonable development of the land of the applicant for the use proposed;

c. That the development of the land proposed by the applicant would not be such as to defeat the purposes of chapter 10;

d. That the development proposed by applicant is the minimum development which would be needed to secure for applicant from the land a reasonable return in service, use or income;

e. That the development proposed by applicant would not result in damage to neighboring properties or public lands.

(3) *Oaths and attendance of witnesses.* For the purpose of exercising the powers enumerated in this section, the board shall elect a chairperson and vice-chairperson. The chairperson, or, in the chairperson's absence, the vice-chairperson, shall administer oaths to or accept affirmations from witnesses and may compel the attendance of witnesses. A failure or a refusal to appear in response to a subpoena issued by the board shall constitute a violation of this article.

(Code 1950, § 649.1-4)

Supreme Court, U.S.
FILED
MAY 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
Appellant,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

BRIEF IN SUPPORT OF APPELLANT HARSH INVESTMENT CORP.

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QUESTIONS PRESENTED

Appellees Landmark Land Company, Inc.* and South-

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*The following are subsidiaries of Landmark Land Company, Inc.:

Dixie Savings & Loan Association; Unique Golf Concept, Inc.; Dixiensurance Agency, Inc.; Landmark Title Agency, Inc.; Landmark Financial Services, Inc.; United Bankers Mortgage Corporation; Kansas Bankers Mortgage Corporation; Dixie Finance Company; Dixie Management Corporation, Inc.; St. Bernard Savings & Loan Association; Landmark Life Insurance Company; Clock Tower Place Investments, Ltd.; Snyder Capital Partners; Palm Beach Realty Associates; Landmark Land Company of Florida, AG; Investors Financial Services; 1615 Development Corp.; Investors Insurance Agency, Inc.; Oak Tree Golf Club, Inc.; Waterford Landmark, Inc.; Landmark Real Estate; Landmark Title Insurance Company, Inc.; La Quinta Air Services; Landmark Land Construction Company; Landmark Land Mission Hills Corp.; Mission Hills Real Estate Company; Carmel Valley Ranch—dba's: Carmel Valley Ranch Golf Club, Carmel Valley Ranch Lodge, Carmel Valley Ranch Properties, Carmel Valley Ranch Realty, Carmel Valley Ranch Resort, Carmel Valley Ranch Sewage Treatment Plant, Carmel Valley Ranch Tennis Club; Dixie Escrow Company, Inc.—dba's: Dixie Escrow Services, LANDMARK Escrow Company, Oak Tree Escrow Company; Hotel Resort Management Ltd.—dba's: La Quinta Hotel; Landmark Land Company of California, Inc.—dba's: Design Centers, Dixie Mortgage Company, Foster Turf Products, FTP Wholesale Growers, La Quinta Hotel Golf and Tennis Resort, La Quinta Hotel Golf Club, La Quinta Hotel Golf and Tennis Resort, Hotel Tennis Club, La Quinta National Golf Club, Landmark Communications, Landmark Mortgage Company, National Car Rental Agency, PGA West, Thermal Nursery; Landmark Land Company of Florida, Inc.—dba's: Palm Beach Polo & Country Club; Landmark Land Company of Louisiana, Inc.—dba's: Belle Terre Golf and Country Club, Landmark Homes, Shelter Industries Company; Landmark Land Company of Oklahoma, Inc.—dba's: Caston Lumber Company, Home Improvement Co., Oak Tree Estates, Oakridge Manor, Oklahoma Business Investments, Inc., Redlands, The Waterford Hotel; Landmark Land Development Corp.—dba's: Clarkdale Realty, Inc. (in Arizona), LML Development Corp. (in California), LML Development Corp. (in Oklahoma); Mission Hills Company—dba's: Mission Hills Country Club, Mission Hills Golf Club, Mission Hills Tennis Club, Mission Hills Real Estate, Mission Hills General and

moor Park Shopping, Inc.** concur in and adopt the statement of Questions Presented by Appellant Harsh Investment Corp. at page (i) of its Jurisdictional Statement.

Administrative Committee; Oak Tree Club, Inc.—dba's: Oak Tree Country Club, Oak Tree Golf Club, Oak Tree Properties.

Olympia & York Realty Corp. is an affiliate of Landmark Land Company, Inc.

** Southmoor Park Shopping, Inc. has no parent companies, subsidiaries, or affiliates.

TABLE OF APPENDICES

Appellees Landmark Land Company, Inc. and Southmoor Park Shopping, Inc. adopt the Appendix to the Jurisdictional Statement presented by Appellant Harsh Investment Corp. All references will be to that Appendix.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1528

HARSH INVESTMENT CORP.,
Appellant,

v.

THE CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

BRIEF IN SUPPORT OF APPELLANT HARSH INVESTMENT CORP.[1]

OPINIONS BELOW

The decision of the Colorado Supreme Court (App. A at 1a-14a), dated December 2, 1986, is reported at 728 P.2d 1281. A transcript of the state district court's decision rendered August 15, 1984, is reproduced in App. B (at 15a-25a). The district court's order dismissing appellee Landmark Land Company Inc., complaint (App. C at 26a) was entered August 28, 1984.

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[1] Appellees Landmark Land Company, Inc. and Southmoor Park Shopping, Inc. respectfully request leave to file this brief despite the expiration of the twenty-day limit for filing such responses provided in Rule 10.4 of the Rules of the Supreme Court of the United States. Appellees received a request from Appellant Harsh Investment Corp. to file a response in support of the Jurisdictional Statement but were unable to complete preparation of such a response in the eight days between the receipt of such request and the expiration of the twenty-day deadline.

JURISDICTION

The decision of the Colorado Supreme Court was rendered December 2, 1986. Appellee Landmark Land Company Inc.'s motion for rehearing was denied by an order of the Colorado Supreme Court entered September 22, 1966 (App. D at 27a-29a). Harsh Investment Corp. filed a notice of appeal (App. E at 30a-33a) with the clerk of the Colorado Supreme Court on March 2, 1987. The Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

CONSTITUTION AND STATUTES

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> "[N]or shall private party be taken for public use, without just compensation."

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> "No state shall * * * deprive any person of life, liberty or property, without due process of law * * *."

Section 10.62.5 of the Revised Municipal Code of the City and County of Denver (hereinafter cited as "Code") is reproduced in Harsh Investment Corp.'s Appendix F at 42a-44a.

STATEMENT OF THE CASE

Appellees Landmark Land Company, Inc. (hereinafter "Landmark") and Southmoor Park Shopping, Inc. (hereinafter "Shopping") adopt the Statement of the Case propounded by Harsh Investment Corp. in its Jurisdictional Statement (pp. 2-10) with the following additions:

The Colorado trial and appellate courts' rejection of a public purpose regulatory taking absent a total deprivation of use and value of private property disregards not only the case-by-case consideration of factual circum-

stances required by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) and *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), but also the distinction between this case, which concerns elimination of a finally established land use by virtue of a "pure" police power action and those cases involving denial of rezoning to a higher or more intensive use or modification of existing zoning by following zoning processes and procedures. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 87 L.Ed.2d 126, 139 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566 (1986).

Landmark is the owner of slightly more than thirteen acres of land, one-half of which is totally undeveloped and the other half of which contains a movie theater and ice rink. Tr. 33.[2] In 1965, Landmark entered into a ninety-nine year development lease for the property, but subsequently purchased it in 1981 and planned an office building, parking structure, and relocation of the movie theatre. Tr. 33, 66. Neighborhood opposition to the development plan generated numerous meetings between Landmark and the neighborhood homeowners' association, which resulted in concessions by Landmark, including elimination of the theatre and a reduction in density. Tr. 33-44. The negotiations ended when the association requested that Landmark reduce the office density by nearly two hundred twenty-five thousand square feet. Tr. 45.

Two rezoning attempts filed by the homeowners' association followed, both of which attempted to reduce the potential build-out by forty percent. Tr. 50. Following this, the challenged mountain view ordinance, § 10-62-5 of the Code, was enacted which eliminated Landmark's ability to build a valuable twenty-one story office building, limiting any structure on the land to forty-two feet, or approximately

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[2] "Tr." references the transcript of proceedings before the Denver District Court.

three stories. App. F; Tr. 50, 57. The trial court noted that undisputed testimony substantiated Landmark's claim of devaluation of its property and found that the diminution was "substantial" (App. B, p. 19a).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In contrast with other cases which raise a taking claim, this case presents a true taking away of existing, authorized uses of land not by changing the legally established use through a change of zoning classification but rather by superimposition of police power legislation which purports to protect a scenic mountain view. Unlike the quasi-judicial process of zoning or rezoning, which requires a modicum of due process through notice, public hearing, and factual determinations (App. A, p. 8a), there is no requirement for such due process in the enactment of legislation.

At the very least, this use of the police power should be supported by a more concrete definition of the substantial public purpose of a regulation which interferes with legitimate land use than mere allusion to the general welfare, *Nectow v. City of Cambridge*, 277 U.S. 183, 187-188 (1928). While the absolute protection of private property provided by the Fifth and Fourteenth Amendments may be qualified by the police power, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Pennsylvania Coal Co.*, 260 U.S. at 415.

Nonetheless, the Colorado Supreme Court foreclosed any examination of the ordinance's public purpose, which obviated any need for consideration of whether "the interests of the public * * * require such interference", *Lawton v. Steele*, 152 U.S. 133, 137 (1894), effectively equating enactment of legislation with public necessity. Further the Colorado court repudiated any weighing of the public

benefit provided against the private burden imposed, barring any deliberation of whether "the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals". *Id.*

This approach contravenes the balancing principles of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136 (1978) and *Kaiser Aetna*, 444 U.S. at 175 which impart the constitutional protections while "giving due weight to the new conditions". *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). A review of the lower court's decision is therefore warranted lest the vicissitudes of political judgments and the power of majorities and officials override the very purpose of the Fifth Amendment and eliminate private property. "One's right to life, liberty and property . . . may not be submitted to vote." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

Accepting, *arguendo*, that the challenged ordinance bears a substantial relation to the general public health, safety, or welfare, *Nectow* 277 U.S. at 188, inquiry still must be made of its impact on the three commercial properties, *Penn Central*, 438 U.S. at 136. In Landmark's case, as with Harsh and Southmoor, the ordinance effectively occupied the total air space above the forty-two foot level for the politically acceptable purpose of temporarily preserving a fragmentary mountain view in response to submission of a development plan meeting all existing zoning requirements. The Landmark property derived no benefit from the ordinance, only burden.

That this abrogated the reasonable investment-backed expectations Landmark had for its property is not disputed. Under the single issue test, enunciated by the Colorado Supreme Court, since there was some remaining value and use for this property, the fact that legitimate and reasonable uses permitted by zoning were eliminated without a zoning change is inconsequential, notwithstand-

ing other similarly situated commercial property owners were not so affected merely because their structures had already been constructed.

The preexisting air rights of Landmark, like those of Appellant Harsh and of Shopping have been taken away, as has the right to build a single, high-rise office under the existing zone category merely because the property lies between a small neighborhood park and the mountains and neighborhood opposition, having failed to change the permitted zoning use, determined to preserve an admittedly temporary mountain view. The narrow and inflexible determination of a regulatory taking established by the Colorado courts fails to accord Landmark, Shopping, or Appellant Harsh any measure of the protection established in the Fifth and Fourteenth Amendments.

Unlike the urban renewal project challenged in *Berman v. Parker*, 348 U.S. 26 (1954), and the landmark preservation scheme found in *Penn Central*, 438 U.S. at 132, both of which comprised part of a comprehensive plan, the challenged ordinance is subject to no comprehensive plan and, in fact, contravened the mountain view protection principles established by the Denver planning office. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.*, 260 U.S. at 416. This case presents an opportunity to clarify the myriad of issues repeatedly raised when private property is regulated by the police power and to provide some definition of when "regulation goes too far". *Pennsylvania Coal Co.*, 260 U.S. at 415.

In all other respects, Landmark and Shopping adopt the arguments set forth in Appellant Harsh Investment Corp.'s Jurisdictional Statement.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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OCTOBER TERM, 1986

HARSH INVESTMENT CORP.,
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THE CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court for the State of Colorado

REPLY TO MOTION TO DISMISS OR AFFIRM

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REPLY TO MOTION TO DISMISS OR AFFIRM

Contrary to the principal submission of appellees (Motion to Dismiss 10-13), appellant has not presented this Court with a premature claim of hypothetical harm.[1] The adoption of the SPEHA mountain view ordinance "inflict[ed] an actual, concrete injury" upon appellant. *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 193 (1985). Appellant suffered an immediate loss in the value of its property, as evidenced by the unwillingness of a prospective buyer to purchase the property after the ordinance went into effect. Tr. 192. The Denver Municipal Code, moreover, makes it a penal offense for appellant to even *design* a structure in violation of the SPEHA ordinance. Code §§ 10-57, 10-65, 1-13; J.S. App. 35a, 45a. The questions presented here are plainly ripe for judicial resolution.

These questions, moreover, are substantial. Appellant does not present a mere facial challenge to the SPEHA ordinance, but rather alleges that the application of the ordinance to its property exceeds constitutional limits. See J.S. 10-11. Thus, a court must do more than inquire whether the SPEHA ordinance has " 'denie[d] [appellant the] economically viable use of [its] land.' " Motion to Dismiss 13 (quoting *Keystone Bituminous Coal Association v. DeBenedictus*, 107 S. Ct. 1232, 1247 (1987)). Rather, proper analysis requires a careful consideration of the factors set out in the Jurisdictional Statement (at 15-28). See *Hodel v. Irving*, 55 U.S.L.W. 4653, 4656 (May 18, 1987). Thus, contrary to the assertions in the Motion to Dismiss, this appeal presents a controversy brimming with serious constitutional questions. The Court should note probable jurisdiction and conduct that analysis.

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[1] The other major landowners impacted by the SPEHA ordinance, Landmark Land Company, Inc., and Southmoor Park Shopping, Inc., are parties to this appeal. Supreme Court Rule 10.4. They have, moreover, urged the Court to note probable jurisdiction and rule in favor of appellant. *See* May 19, 1987 Letter to the Supreme Court of the United States by counsel for Landmark Land Company and Southmoor Park Shopping.

1. This Court has emphasized that, because of the difficulty of the multi-factored Takings Clause analysis, Fifth and Fourteenth Amendment compensation claims are not ripe for judicial review absent "an actual, concrete injury." *Williamson County*, 473 U.S. at 193. In previous cases, as noted by appellees (Motion to Dismiss 10-13), this Court has declined review because the lower court records did not reflect how various land-use regulations applied "to the particular land[s] in question." *Id.*, 473 U.S. at 191.[2]

Appellees' ripeness arguments are premised entirely on the assumption that the only injury resulting from land-use restrictions is the possible disruption of ongoing development plans. Motion to Dismiss 10-13. But the impact of land-use regulations extends beyond the drafting board. Property is held for many reasons other than development, including resale to others at a profit. And the record here unequivocally establishes that, despite the absence of any immediate development plans for its property (Motion to Dismiss 11), appellant suffered at least a $9 million loss immediately upon enactment of the SPEHA ordinance.

Appellant's vice president (Tr. 169) testified at trial that, prior to the restrictions imposed by the mountain view ordinance, appellant's "property just in land value was worth fifteen to sixteen million dollars." Tr. 185. Following passage of the ordinance, the property became worth no more than its "income basis" value of $6 million. Tr. 184.[3] This loss, furthermore, is not merely a hypothetical entry in appellant's accounting records. Appellant, at the time the SPEHA ordinance was passed, had received an offer to purchase its property for $15 million. Tr. 192. With the ordinance in place, however,

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[2] *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

[3] The property's "income basis" value is determined by capitalizing its current income flow. Tr. 184.

appellant's buyer has no further interest (Tr. 192) and any sale will now bring no more than the "income basis" value. Tr. 184-185. This loss certainly fits well within any reasoned conception of "concrete injury." *Williamson County*, 473 U.S. at 198.[4]

Appellees nevertheless claim that, until appellant submits a plan to develop its property in violation of the SPEHA ordinance and is denied a variance to permit such development, review here is premature. Motion to Dismiss 13. This assertion flies in the face of the SPEHA ordinance itself.

The Denver Municipal Code provides that "no structure shall be designed" unless it conforms with applicable mountain view restrictions (Code § 10-57; J.S. App. 35a), and renders violation of that proscription a penal offense (Code §§ 10-65, 1-13; J.S. App. 45a). Thus, appellees' claim that appellant must "apply[ ] for a building permit" before "presenting this Court with a ripe, concrete controversy" (Motion to Dismiss 13) is ludicrous. Appellant cannot apply for a building permit—or seek a variance to actually build the structure for which it desires a permit—without violating the very ordinance it challenges here. *CF&I Steel Corp. v. Colorado Air Pollution Control Commission*, 610 P.2d 85

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[4] *Board of County Commissioners v. City of Thornton*, 629 P.2d 605, 609 (Colo. 1981) (en banc) ("It cannot be doubted that diminution of value of * * * property constitutes injury in fact"). Appellees suggest that appellant's valuation evidence was not "expert" and was "plainly self serving." Motion to Dismiss 3 n.1. That evidence, however, was given by appellant's vice president in charge of acquisition and disposition of investment properties, who was certainly in an excellent position to know the value of appellant's holdings. Tr. 169. Moreover, the estimates of value submitted by appellant were based on a careful consideration of interest rates, rental rates, expense rates and capitalization rates. Tr. 179. Furthermore, appellees did not dispute the economic impact of the SPEHA ordinance on appellant's property, and they should not be permitted to complain that "no independent testimony or valuation was offered at any time as to the value of [appellant's] property." Motion to Dismiss 3 n.1. Appellees had the opportunity at trial to counter appellant's evidence, but did not.

(Colo. 1980) (en banc); *Colorado State Board of Optometric Examiners v. Dixon*, 440 P.2d 287 (Colo. 1968) (en banc). The City of Denver cannot have it both ways. It has prohibited appellant, by the very terms of its mountain view ordinance, from planning any development in violation of the SPEHA ordinance. Code §§ 10-57, 10-65, 1-13. The City should not be permitted to evade review in this Court by arguing that, because appellant has followed that command, appellant's challenge to the ordinance is not "ripe."

Even if it were possible for appellant to apply for a building permit or obtain a variance without violating the SPEHA ordinance, appellant should not be required to do so before obtaining review in this Court. The entire history of the SPEHA ordinance shows that it was adopted solely to halt further intensive development of appelant's property. See J.S. 4-8. The ultimate outcome of any attempt by appellant to relax the restrictions of the SPEHA ordinance on its property is foreordained. See *Ogo Associates v. City of Torrance*, 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761, 763 (1974) ("here appellants can positively state that the City Council would not have granted them a variance. The evidence is overwhelming that the City Council rezoned the * * * area because appellants planned to build their project there; it is inconceivable the City Council would grant a variance for the very project whose prospective existence brought about the enactment of rezoning. * * * To require appellants to apply to the City Council for a variance on behalf of this project would be to require them to pump oil from a dry hole").[5]

Moreover, a variance from the SPEHA ordinance can be granted only upon a showing of "exceptional and ex-

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[5] *Cf. NLRB v. Industrial Union of Marine & Shipbuilding Workers of America*, 391 U.S. 418 (1968) (administrative remedies need not be exhausted where the exercise would be futile and a negative result clear); *City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24 (1934) (same); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928) (same).

traordinary circumstances." Code § 41-74. The authorized variances cited by appellees (Motion to Dismiss 13 n.10), which permitted several small balconies and a narrow slice of otherwise unregulated structures to intrude into a view plane, demonstrate that mountain view ordinances are given an exceedingly strict construction by the Denver Board of Plan Enforcement Review and Variation.[6] Those two variances, in fact, demonstrate that relief is given from view plane restrictions only where there is some doubt about the applicability of a mountain view ordinance to a given structure and any intrusion into the view plane is, in any event, *de minimis*.[7] Those circumstances—questionable coverage and insignificant deviation—would not be present should appellant make any proposal to depart significantly from the terms of the SPEHA ordinance.[8] Thus, it is quite

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[6] The Terracentre Association variance cited by appellees permitted small balconies located on the 13th and 14th floors of an office tower to intrude into a view plane. The Board of Plan Enforcement Review and Variation noted in granting the variance that, because of the manner in which the view plane was drawn, "it is difficult to determine if the Ordinance actually affects any part of the building." Findings, Terracentre Association (4/9/81) at par. 9. Moreover, the maximum possible encroachment by the balconies into the view plane was "8.23 feet." *Id.*

The second variance cited by appellees involved the United Bank of Denver Tower. There, over 95% of a proposed office tower to be constructed on land zoned B-5 was outside the scope of any mountain view restrictions. However, a small "notch" of the building, approximately 13 feet wide and 154 feet tall, intruded into the City Park-Natural History Museum view plane. Transcript of Hearing Before the Board of Plan Enforcement Review and Variation, Jan. 17, 1980, at 11. The Board of Plan Enforcement Review and Variation granted a variance to permit construction of the "notch," finding that "B-5 zoning land was not intended to be encumbered by the Mountain View Plane Ordinance" and construction of the "notch" would "not reduce the silhouette of the building in relation to the view of the mountains." Findings, United Bank of Denver and Gerald Hines (jointly) (1/17/80) at pars, 6, 7.

[7] *See* note 6, *supra*.

[8] Furthermore, the parties who designed the structures involved in the above variance proceedings avoided the proscription of Code § 10-57, which prohibits the designing of structures covered by

clear that, as a result of that ordinance, appellant has lost all practical right to develop its property above 42 feet in height.[9]

Finally, as will be shown below, the record in this case does not suffer from factual deficiencies that will make application of the Just Compensation Clause unnecessarily difficult. See *Williamson County*, 473 U.S. at 190-191. Appellant's evidence at trial fully explicated the impact of the SPEHA ordinance on its property. J.S. 8-10. There is simply no just basis for denying review on ripeness grounds.

2. Beyond ripeness concerns, appellees suggest that appellant "raises a federal question only if it meets a simple, but strict test: whether the Mountain View Ordinance deprives [appellant] of economically viable use of its land." Motion to Dismiss 16. Use of this single-factor test, however, is patently improper where the constitutionality of land-use regulations as applied to discrete property is at stake. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); J.S. 10-15.[10] And, despite appellees' assertion to the contrary, this case does not present a "simple" facial challenge.[11]

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mountain view restrictions, because those restrictions were not clearly applicable to the *de minimis* intrusions involved. Appellant cannot similarly escape Code § 10-57.

[9] This Court should not deny review here on "ripeness" grounds simply because, at some future date, the Denver Board of Plan Enforcement Review and Variation might give appellant the right to erect, for example, a 50-foot flagpole on its property.

[10] Indeed, the Colorado Supreme Court's erroneous use of a "total loss of value" test is one of the primary issues raised by this appeal. J.S. 11-15. Appellees' suggestion (Motion to Dismiss 9) that the Colorado Supreme Court did not apply such a test is disingenuous. The Motion to Dismiss cites, at page 9, the Colorado Supreme Court's conclusion that appellant does not meet the "test" for a taking, but omits any reference to the "test" actually applied by the court: "it must be shown that the 'ordinance precludes the use of [the] property for *any* reasonable purpose.'" J.S. App. 13a (emphasis in original).

[11] Appellees' claim that the "only challenge to the [SPEHA ordinance] is that it is facially invalid" (Motion to Dismiss 13) distorts

Accordingly, proper resolution of this appeal requires application of the multiple, *ad hoc* factors set out in *Penn Central* and most recently discussed in *Irving*, 55 U.S.L.W. at 4656.[12] Analysis of those factors, furthermore, shows that appellant has raised a substantial Takings Clause claim that merits plenary review.

A. In *Irving*, the Court concluded that the escheat provision of the Indian Land Consolidation Act of 1983 had a "substantial" economic impact upon the Indian owners of allotted lands, even though "the income generated by such parcels may be properly thought of as *de minimis*" and the owners "retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*." 55 U.S.L.W. at 4656. The Court reached that conclusion because the "right to pass on valuable property to one's heirs is itself a valuable right." *Id.* Similar reasoning underscores the dramatic economic impact of the SPEHA ordinance upon appellant.

Here, appellant has lost all right to develop its property above 42 feet because the City of Denver has condemned a scenic easement across its property. J.S. 9.

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and misconceives appellant's position throughout this litigation. Appellant has always challenged the constitutionality of the SPEHA ordinance *as applied* to its property. Paragraph 7 of appellant's complaint, for example, alleged that "*the impact of the Southmoor Ordinance on plaintiff's property* is so onerous as to constitute a taking of the plaintiff's property." Complaint for Injunctive and Declaratory Relief, Certiorari and Damages, No. 82CV6782, District Court, City and County Of Denver (emphasis added). Appellant's concrete evidence regarding the effect of the ordinance on its property value (J.S. 8-10) shows that it did much more than mount a facial challenge. *Cf. Keystone Bituminous Coal Association v. DeBenedictus*, 107 S. Ct. 1232 (1987) (petitioners did not allege or prove any specific injury caused by enforcement of mine subsidence act).

[12] Those factors include " 'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.' " *Irving*, 55 U.S.L.W. at 4656 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). *See also* J.S. 15-23.

Although appellant retains the ability to use the portion of its property not burdened by the easement, the parcel nevertheless has been devalued by at least 60%. J.S. 16 & n.22.[13] Moreover, there can be little doubt but that the easement taken by the city "is itself a valuable right." *Irving*, 55 U.S.L.W at 4656.[14] And as to the easement, the extent of the taking has been, not 60%, but 100%. *Cf. Irving*, 55 U.S.L.W. at 4657 ("a *total* abrogation of these rights cannot be upheld"). Thus, the economic impact of the SPEHA ordinance upon appellant is unquestionably substantial. See J.S. 16-17.[15]

B. Appellees state that there is nothing in the record regarding appellant's "investment-backed expectations" (Motion to Dismiss 17) and assert that SPEHA's attempts to rezone the property regulated by the mountain view ordinance "are utterly irrelevant to this proceeding" (*id.* at 5). However, as shown in the Jurisdictional Statement (at 17-20), there is substantial evidence in the record illuminating the SPEHA ordinance's frustration of appellant's investment-backed expectations.[16] Furthermore, SPEHA's inability to achieve its desired goals through normal zoning procedures is central to appellant's submission in this case.

The SPEHA ordinance completely upset appellant's legitimate zoning-backed expectations. Although appel-

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[13] Unlike the situation in *Penn Central*, 438 U.S. at 137, there is no "transferable development rights" program to mitigate this economic loss. J.S. 16-17.

[14] Indeed, scenic easements have demonstrable value. Cantrell, *Scenic Easements: Evaluation Considerations*, 49 Real Estate Appraiser and Analyst 61 (1983); Sutte, *Scenic Easements*, 34 Appraisal Journal 531 (1966).

[15] Citing *Andrus v. Allard*, 444 U.S. 51 (1979), appellees suggest that any "strand" taken by the City of Denver from appellant's "bundle" of property rights is "a slim reed." Motion to Dismiss 16 n. 14. The continuing vitality of *Andrus* in support of such a proposition, however, is doubtful. *See Irving*, 55 U.S.L.W. at 4657 (Scalia, Powell, and Rehnquist, C.J., concurring).

[16] The undisputed evidence developed before the trial court shows that the investment expectation from appellant's property has been reduced by $35,380,000. Tr. 180-182; J.S. 8-9.

lant's property rights are always subject to legitimate government regulation, appellant had the right under state zoning law to expect that, if "environmental concern[s] or a change of circumstances" warranted alteration of those rights, "the proper procedure [was] to amend the zoning resolution." *Western Paving Const. Co. v. Board of County Commissioners of Boulder County*, 506 P.2d 1230, 1232 (Colo. 1973) (en banc). *Cf. Kaiser Aetna*, 444 U.S. at 179 (government actions "can lead to the fruition of a number of expectancies embodied in the concept of 'property'"). SPEHA pushed for the adoption of a mountain view ordinance only when it became apparent that appellant's legitimate zoning-backed expectations could not be altered in the ordinary course. J.S. 4-8. The ordinance, furthermore, was the result of a political process in which appellant had no effective voice. J.S. 18-20.[17] Thus, the second of this Court's "ad hoc" factors—interference with reasonable investment-backed expectations—strongly suggests that a taking has occurred.

C. The nature of the governmental action involved here also supports the conclusion that the SPEHA ordinance constitutes a taking of appellant's property. J.S. 20-23. The SPEHA ordinance does not proscribe a property use that is dangerous to the safety, health, or welfare of others. *Cf. Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Nor does it apply over a broad cross section of society or secure "something of an 'average reciprocity of advantage.'" *Irving*, 55 U.S.L.W. at 4656 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 398 (1922)). *Cf. Gorieb v. Fox*, 274 U.S. 603 (1927); *Welch v. Swasey*, 214 U.S. 91 (1909). Accordingly, appellees'

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[17] Appellee's assertion that appellant had "full and complete access to the political process" (Motion to Dismiss 7) ignores the reality that, as found by the trial court, this was "one of those cases where these people [the landowners] don't have very many votes and the Southmoor Park East Homeowners Association has several hundred." J.S. App. 24a.

citation of *Goldblatt*, *Gorieb* and *Welch* (Motion to Dismiss 14) is beside the point; the City of Denver's action here moves well beyond the propositions for which those cases stand.

Denver has condemned a scenic easement across appellant's property and, while the benefits of that easement flow to the public, the city has placed all of the attendant costs upon appellant. This Court would certainly not permit, without compensation, similar governmental action involving a utility easement. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This case gives the Court a needed opportunity to clarify whether the costs of a scenic easement—which are considerably more significant than those involved in a utility easement—should be "borne by corporations" rather than "individual taxpayers." *Penn Central*, 438 U.S. at 152-153 (Rehnquist, J., dissenting).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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Appellant,

v.

CITY AND COUNTY OF DENVER, *et al.*,
Appellees.

On Appeal from the Supreme Court, State of Colorado

REPLY TO BRIEF IN SUPPORT OF APPELLANT HARSH INVESTMENT CORP.

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FACTUAL BACKGROUND

This case is an appeal from the Colorado Supreme Court. Of the three appellants in the Colorado Supreme Court, only one, Harsh Investment Corp. ("Harsh"), has appealed to this Court. Harsh filed its Jurisdictional Statement on March 23, 1987. On April 10, 1987, the Clerk of this Court granted all appellees an extension of time up to and including May 20, 1987, to respond to Harsh's Jurisdictional Statement. Landmark Land Company, Inc. ("Landmark") and Southmoor Park Shopping, Inc. ("Shopping"), the other two appellants in the Colo-

rado Supreme Court, have now filed a Brief in Support of Appellant Harsh Investment Corp. ("Brief"), dated May 26, 1987.

ARGUMENT

The Brief is untimely and must be stricken. Under Supreme Court Rule 10.4, Landmark and Shopping are Appellees in this case. They are, therefore, bound by Rule 10.4, which requires briefs in support by May 20, 1987, the extended deadline set by the Clerk of the Court.

Moreover, the Brief raises no issues not presented in Harsh's Jurisdictional Statement. Rather, it repeats Harsh's suggestion that Denver should have followed rezoning procedures in enacting the Mountain View Ordinance, and erroneously implies that the Mountain View Ordinance is invalid because it is not a "comprehensive plan." Brief at 6.

First, the Mountain View Ordinance is a comprehensive, citywide plan. It protects views from eight peaks, located throughout Denver. Tr. at 344-46; Denver Municipal Code §§ 10-56 - 10-62.5. In addition, this Court has never held that as a matter of federal law, a city must follow zoning procedures to regulate the height of buildings. To the contrary, decisions concerning the character of height and bulk regulations are purely matters of local concern, *see Gorieb v. Fox*, 274 U.S. 603, 608 (1927), and this Court has upheld various non-zoning restrictions on the height and bulk of buildings. *E.g., Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978); *Gorieb v. Fox, supra*; *Welch v. Swasey*, 214 U.S. 91 (1909).

CONCLUSION

The Brief in Support of Appellant Harsh Investment Corp. is untimely and must be stricken. For the reasons stated herein and in the Motion to Dismiss or Affirm, the Court should dismiss this appeal or affirm the decision of the Colorado Supreme Court.

Respectfully submitted,

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